

The Burger Court Opinion Writing Database

Mitchell v. Forsyth

472 U.S. 511 (1985)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

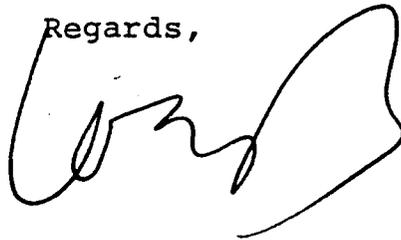
May 7, 1985

Re: No. 84-335 - Mitchell v. Forsyth

Dear Sandra:

Please show me as joining your separate opinion.

Regards,

A handwritten signature in black ink, appearing to be "W. O'Connor", written in a cursive style.

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 12, 1985

Re: No. 84-335 - Mitchell v. Forsyth

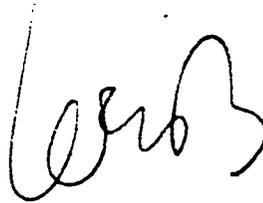
Dear Sandra:

Since I joined your separate opinion, I have focused on our holding in the Gravel case that gives Congressional "aides" (only the Lord knows how many!) the absolute immunity of a Member of Congress.

I therefore write out a separate opinion. I recognize that the Speech or Debate Clause is an express grant to Members. But if a President can't let the Attorney General of the United States derive absolute immunity, something is drastically wrong.

Regards,

Justice O'Connor



Copies to the Conference

PS

My concurrence went out
yesterday without this note.



To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: JUN 13 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-335

JOHN N. MITCHELL, PETITIONER *v.*
KEITH FORSYTH

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

[June —, 1985]

CHIEF JUSTICE BURGER, concurring.

With JUSTICE O'CONNOR, I join Parts I, III, and IV of the Court opinion and the judgment of the Court. I also agree that the Court's discussion of the absolute immunity issue is unnecessary for the resolution of this case. I write separately to emphasize my agreement with JUSTICE STEVENS that the Court's extended discussion of this issue reaches the wrong conclusion.

In *Gravel v. United States*, 408 U. S. 606 (1972), we held that aides of Members of Congress who implement the legislative policies and decisions of the Member enjoy the same absolute immunity from suit under the Speech and Debate Clause that the Members themselves enjoy. As I noted in dissent in *Harlow v. Fitzgerald*, 457 U. S. 800, 822 (1982), the logic underlying *Gravel* applies equally to top Executive aides. A Cabinet officer—and surely none more than the Attorney General—is an “aide” and arm of the President in the execution of the President's constitutional duty to “take Care that the Laws be faithfully executed.” It is an astonishing paradox that the aides of the 100 Senators and 435 Representatives share the absolute immunity of the Member, but the President's chief aid in protecting internal national security does not. I agree that the petitioner was entitled to absolute immunity for actions undertaken in his exercise of

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

April 5, 1985

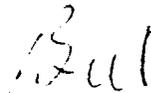
No. 84-335

Mitchell v. Forsyth

Dear Byron,

Please join me in Parts I and II of your opinion. However, I cannot agree that qualified immunity determinations are generally appealable and plan to circulate an opinion to that effect as soon as I can get around to it.

Sincerely,



Justice White

Copies to the Conference

To: The Chief Justice
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

May 30
1985

From: Justice Brennan

Circulated: _____

Recirculated: _____

p.2

WJB

PLI
11/5

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-335

JOHN N. MITCHELL, PETITIONER *v.*
KEITH FORSYTH

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

[June —, 1985]

JUSTICE BRENNAN, concurring in part and dissenting in part.

I join Parts I and II of the Court's opinion, for I agree that qualified immunity sufficiently protects the legitimate needs of public officials, while retaining a remedy for those whose rights have been violated. Because denial of absolute immunity is immediately appealable, *Nixon v. Fitzgerald*, 457 U. S. 731, 743 (1982), the issue is squarely before us and, in my view, rightly decided.

I disagree, however, with the Court's holding that the qualified immunity issue is properly before us. For the purpose of applying the final judgment rule embodied in 28 U. S. C. § 1291, I see no justification for distinguishing between the denial of Mitchell's claim of qualified immunity and numerous other pretrial motions that may be reviewed only on appeal of the final judgment in the case. I therefore dissent from its holding that denials of qualified immunity are in all circumstances appealable.

I

The Court acknowledges that the trial court's refusal to grant Mitchell qualified immunity was not technically the final order possible in the trial court. If the refusal is to be immediately appealable, therefore, it must come within the narrow confines of the collateral order doctrine of *Cohen v.*

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STAFF OF THE COURT
SEE PAGE 1

1, 4, 5, 8, 10, 13, 14

To: The Chief Justice
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: _____

Recirculated: JUN 11 1985

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-335

JOHN N. MITCHELL, PETITIONER *v.*
KEITH FORSYTH

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

[June —, 1985]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins,
concurring in part and dissenting in part.

I join Parts I and II of the Court's opinion, for I agree that qualified immunity sufficiently protects the legitimate needs of public officials, while retaining a remedy for those whose rights have been violated. Because denial of absolute immunity is immediately appealable, *Nixon v. Fitzgerald*, 457 U. S. 731, 743 (1982), the issue is squarely before us and, in my view, rightly decided.

I disagree, however, with the Court's holding that the qualified immunity issue is properly before us. For the purpose of applying the final judgment rule embodied in 28 U. S. C. § 1291, I see no justification for distinguishing between the denial of Mitchell's claim of qualified immunity and numerous other pretrial motions that may be reviewed only on appeal of the final judgment in the case. I therefore dissent from its holding that denials of qualified immunity, at least where they rest on undisputed facts, are generally appealable.

I

The Court acknowledges that the trial court's refusal to grant Mitchell qualified immunity was not technically the final order possible in the trial court. If the refusal is to be immediately appealable, therefore, it must come within the narrow confines of the collateral order doctrine of *Cohen v.*

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 12, 1985

No. 84-335

Mitchell v. Forsyth

Dear Byron,

Thanks for your letter. I do not
intend to make any further changes in my
opinion.

Sincerely,



Justice White

Copies to the Conference

Pp. 6, 7

To: The Chief Justice
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: _____

Recirculated: JUN 17 1985

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-335

JOHN N. MITCHELL, PETITIONER v.
KEITH FORSYTH

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

[June —, 1985]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins,
concurring in part and dissenting in part.

I join Parts I and II of the Court's opinion, for I agree that
qualified immunity sufficiently protects the legitimate needs
of public officials, while retaining a remedy for those whose
rights have been violated. Because denial of absolute immu-
nity is immediately appealable, *Nixon v. Fitzgerald*, 457
U. S. 731, 743 (1982), the issue is squarely before us and, in
my view, rightly decided.

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qualified immunity issue is properly before us. For the pur-
pose of applying the final judgment rule embodied in 28
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tween the denial of Mitchell's claim of qualified immunity and
numerous other pretrial motions that may be reviewed only
on appeal of the final judgment in the case. I therefore dis-
sent from its holding that denials of qualified immunity, at
least where they rest on undisputed facts, are generally
appealable.

I

The Court acknowledges that the trial court's refusal to
grant Mitchell qualified immunity was not technically the
final order possible in the trial court. If the refusal is to be
immediately appealable, therefore, it must come within the
narrow confines of the collateral order doctrine of *Cohen v.*

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To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: MAR 27 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-335

**JOHN N. MITCHELL, PETITIONER v.
KEITH FORSYTH**

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

[March —, 1985]

JUSTICE WHITE delivered the opinion of the Court.

This is a suit for damages stemming from a warrantless wiretap authorized by petitioner, a former Attorney General of the United States. The case presents three issues: whether the Attorney General is absolutely immune from suit for actions undertaken in the interest of national security; if not, whether the District Court's finding that petitioner is not immune from suit for his actions under the qualified immunity standard of *Harlow v. Fitzgerald*, 457 U. S. 800 (1982), is appealable; and, if so, whether the District Court's ruling on qualified immunity was correct.

I

In 1970, the FBI learned that members of an anti-war group known as the East Coast Conspiracy to Save Lives (ECCSL) had made plans to blow up heating tunnels linking federal office buildings in Washington, D. C., and had also discussed the possibility of kidnapping then-National Security Adviser Henry Kissinger. On November 6, 1970, acting on the basis of this information, the then Attorney General John Mitchell authorized a warrantless wiretap on the telephone of William Davidon, a Haverford College physics professor who was a member of the group. According to the Attorney General, the purpose of the wiretap was the gathering of intelligence in the interest of national security.

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

New material at 14, 16-18;
— footnotes renumbered;
— stylistic throughout

Circulated: _____
— Recirculated: JUN 7 1985

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-335

**JOHN N. MITCHELL, PETITIONER v.
KEITH FORSYTH**

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

[June —, 1985]

JUSTICE WHITE delivered the opinion of the Court.

This is a suit for damages stemming from a warrantless wiretap authorized by petitioner, a former Attorney General of the United States. The case presents three issues: whether the Attorney General is absolutely immune from suit for actions undertaken in the interest of national security; if not, whether the District Court's finding that petitioner is not immune from suit for his actions under the qualified immunity standard of *Harlow v. Fitzgerald*, 457 U. S. 800 (1982), is appealable; and, if so, whether the District Court's ruling on qualified immunity was correct.

I

In 1970, the FBI learned that members of an anti-war group known as the East Coast Conspiracy to Save Lives (ECCSL) had made plans to blow up heating tunnels linking federal office buildings in Washington, D. C., and had also discussed the possibility of kidnapping then-National Security Adviser Henry Kissinger. On November 6, 1970, acting on the basis of this information, the then Attorney General John Mitchell authorized a warrantless wiretap on the telephone of William Davidon, a Haverford College physics professor who was a member of the group. According to the Attorney General, the purpose of the wiretap was the gathering of intelligence in the interest of national security.

NOT RECORDED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Pp. 17, 20 & 23

Circulated: _____

Recirculated: JUN 11 1985

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-335

**JOHN N. MITCHELL, PETITIONER *v.*
KEITH FORSYTH**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT**

[June —, 1985]

JUSTICE WHITE delivered the opinion of the Court.

This is a suit for damages stemming from a warrantless wiretap authorized by petitioner, a former Attorney General of the United States. The case presents three issues: whether the Attorney General is absolutely immune from suit for actions undertaken in the interest of national security; if not, whether the District Court's finding that petitioner is not immune from suit for his actions under the qualified immunity standard of *Harlow v. Fitzgerald*, 457 U. S. 800 (1982), is appealable; and, if so, whether the District Court's ruling on qualified immunity was correct.

I

In 1970, the FBI learned that members of an anti-war group known as the East Coast Conspiracy to Save Lives (ECCSL) had made plans to blow up heating tunnels linking federal office buildings in Washington, D. C., and had also discussed the possibility of kidnapping then-National Security Adviser Henry Kissinger. On November 6, 1970, acting on the basis of this information, the then Attorney General John Mitchell authorized a warrantless wiretap on the telephone of William Davidon, a Haverford College physics professor who was a member of the group. According to the Attorney General, the purpose of the wiretap was the gathering of intelligence in the interest of national security.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 12, 1985

84-335 - Mitchell v. Forsyth

Dear Bill,

I am making two changes in the circulating draft in this case. First, I am adding a citation to footnote 5. Second, I am inserting the following at the end of the first paragraph of footnote 10:

The dissent's explanation that the absolute immunity and double jeopardy cases do not involve a determination of the defendant's liability "on the merits" similarly fails to distinguish those cases from this one. The reason is that the legal determination that a given proposition of law was not clearly established at the time the defendant committed the alleged acts does not entail a determination of the "merits" of the plaintiff's claim that the defendant's actions were in fact unlawful.

Sincerely yours,



Justice Brennan

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: JUN 13 1985

pp. 7 & 17

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-335

JOHN N. MITCHELL, PETITIONER *v.*
KEITH FORSYTH

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

[June —, 1985]

JUSTICE WHITE delivered the opinion of the Court.

This is a suit for damages stemming from a warrantless wiretap authorized by petitioner, a former Attorney General of the United States. The case presents three issues: whether the Attorney General is absolutely immune from suit for actions undertaken in the interest of national security; if not, whether the District Court's finding that petitioner is not immune from suit for his actions under the qualified immunity standard of *Harlow v. Fitzgerald*, 457 U. S. 800 (1982), is appealable; and, if so, whether the District Court's ruling on qualified immunity was correct.

I

In 1970, the FBI learned that members of an anti-war group known as the East Coast Conspiracy to Save Lives (ECCSL) had made plans to blow up heating tunnels linking federal office buildings in Washington, D. C., and had also discussed the possibility of kidnapping then-National Security Adviser Henry Kissinger. On November 6, 1970, acting on the basis of this information, the then Attorney General John Mitchell authorized a warrantless wiretap on the telephone of William Davidon, a Haverford College physics professor who was a member of the group. According to the Attorney General, the purpose of the wiretap was the gathering of intelligence in the interest of national security.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 20, 1985

MEMORANDUM TO THE CONFERENCE

Re: Case held pending decision in Mitchell v. Forsyth, No. 84-335

No. 84-1324, Adams v. Jasinski. In this case, the CALL dismissed for want of jurisdiction petrs' appeal of the District Court's denial of summary judgment on the issue of qualified immunity. Petrs' claim was that their checkpoint search of resp's car did not violate clearly established law. Mitchell indicates that insofar as such an appeal involves only a question of law (i.e., whether it was clearly established that petrs' alleged actions were illegal), the Court of Appeals has jurisdiction to review the denial of summary judgment. Although it is conceivable that there is a factual dispute that would preclude consideration of an interlocutory appeal in this case, it should be up to the CALL to determine in the first instance whether, in light of Mitchell, it has jurisdiction over petrs' appeal. I will vote to GVR on Mitchell.

Bill

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 8, 1985

Re: No. 84-335-Mitchell v. Forsyth

Dear Byron:

I await further writing.

Sincerely,



T.M.

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 10, 1985

Re: No. 84-335-Mitchell v. Forsyth

Dear Bill:

Please join me in your concurring and dissenting opinion.

Sincerely,

T.M.

T.M.

Justice Brennan

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 8, 1985

Re: No. 84-335, Mitchell v. Forsyth

Dear Byron:

Please join me.

Sincerely,



Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 27, 1985

84-335 Mitchell v. Forsyth

Dear Byron:

Please add at the end of the next draft of your opinion that I took no part in the consideration or decision of the above case.

Sincerely,

Lewis

Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 28, 1985

Re: 84-335 - Mitchell v. Forsyth

Dear Byron:

Would you please show in your next circulation that I took no part in the consideration or decision of this case.

Sincerely,

WR

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 28, 1985

Re: 84-335 - Mitchell v. Forsyth

Dear Byron:

Your holding that this wiretap was the kind of exercise of presidential power that comes within §2511(3) persuades me that it also should provide Mitchell with absolute immunity from damages liability. I therefore plan to write a brief opinion concurring in the judgment.

As I indicated at Conference, I could not possibly join the holding that all claims of qualified immunity give rise to appealable orders.

Respectfully,



Justice White

Copies to Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: APR 25 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-335

**JOHN N. MITCHELL, PETITIONER v.
KEITH FORSYTH**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT**

[April —, 1985]

JUSTICE STEVENS, concurring in the judgment.

Some public officials are "shielded by absolute immunity from civil damages liability." *Nixon v. Fitzgerald*, 457 U. S. 731, 749 (1982). For Members of Congress that shield is expressly provided by the Constitution.¹ For various State officials the shield is actually a conclusion that the Congress that enacted the 1871 Civil Rights Act did not intend to subject them to damages liability.² Federal officials have also been accorded immunity by cases holding that Congress did not intend to subject them to individual liability even for constitutional violations. *Bush v. Lucas*, 462 U. S. 367 (1983). The absolute immunity of the President of the United States rests, in part, on the absence of any indication that the authors of either the constitutional text or any relevant statutory text intended to subject him to damages liability predicated on his official acts.

¹"The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place." U. S. Const. Art. 1, Sec. 6, cl. 1.

²See, e. g., *Tenney v. Brandhove*, 341 U. S. 367 (1951); *Pierson v. Ray*, 386 U. S. 547 (1967); *Imbler v. Pachtman*, 424 U. S. 409 (1976).

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77

stylistic changes only

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: _____

MAY 10 1985

May 10 '85

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-335

JOHN N. MITCHELL, PETITIONER *v.*
KEITH FORSYTH

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

[May —, 1985]

JUSTICE STEVENS, concurring in the judgment.

Some public officials are "shielded by absolute immunity from civil damages liability." *Nixon v. Fitzgerald*, 457 U. S. 731, 749 (1982). For Members of Congress that shield is expressly provided by the Constitution.¹ For various State officials the shield is actually a conclusion that the Congress that enacted the 1871 Civil Rights Act did not intend to subject them to damages liability.² Federal officials have also been accorded immunity by cases holding that Congress did not intend to subject them to individual liability even for constitutional violations. *Bush v. Lucas*, 462 U. S. 367 (1983). The absolute immunity of the President of the United States rests, in part, on the absence of any indication that the authors of either the constitutional text or any relevant statutory text intended to subject him to damages liability predicated on his official acts.

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²See, e. g., *Tenney v. Brandhove*, 341 U. S. 367 (1951); *Pierson v. Ray*, 386 U. S. 547 (1967); *Imbler v. Pachtman*, 424 U. S. 409 (1976).

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 7, 1985

Re: 84-335, Mitchell v. Forsyth

Dear Byron:

The deft thrust of your stiletto has drawn blood. I have decided to go out of my way and withdraw footnote 10 from my concurring opinion.

Respectfully,



Justice White

Copies to the Conference

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 6

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

Circulated: _____

Recirculated: JUN 12 1985

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-335

JOHN N. MITCHELL, PETITIONER *v.*
KEITH FORSYTH

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

[May —, 1985]

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²See, e. g., *Tenney v. Brandhove*, 341 U. S. 367 (1951); *Pierson v. Ray*, 386 U. S. 547 (1967); *Imbler v. Pachtman*, 424 U. S. 409 (1976).

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: _____

Recirculated: _____

1st DRAFT

Mar 29/85

SUPREME COURT OF THE UNITED STATES

No. 84-335

JOHN N. MITCHELL, PETITIONER *v.*
KEITH FORSYTH

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

[March —, 1985]

JUSTICE O'CONNOR, concurring in part.

I join parts I, III, and IV of the majority opinion and the judgment of the Court. Our previous cases concerning the qualified immunity doctrine indicate that a defendant official whose conduct did not violate clearly established legal norms is entitled not to stand trial. *Davis v. Scherer*, — U. S. — (1984); *Harlow v. Fitzgerald*, 457 U. S. 800, 815-819 (1982). This entitlement is analogous to the right to avoid trial protected by absolute immunity or by the Double Jeopardy Clause. Where the District Court rejects claims that official immunity or double jeopardy preclude trial, the special nature of the asserted right justifies immediate review. The very purpose of such immunities is to protect the defendant from the burdens of trial, and the right will be irretrievably lost if its denial is not immediately appealable. See *Helstoski v. Meanor*, 442 U. S. 500, 506-508 (1979); *Abney v. United States*, 431 U. S. 651, 660-662 (1977). I agree that the District Court's denial of qualified immunity comes within the small class of interlocutory orders appealable under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949).

Because I also agree that the District Court erred in holding that petitioner's authorization of the wiretaps in 1970 violated legal rights that were clearly established at the time, I concur in the judgment of the Court. The conclusion that

P-1

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-335

**JOHN N. MITCHELL, PETITIONER v.
KEITH FORSYTH**

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

[May —, 1985]

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE joins,
concurring in part.

I join parts I, III, and IV of the majority opinion and the judgment of the Court. Our previous cases concerning the qualified immunity doctrine indicate that a defendant official whose conduct did not violate clearly established legal norms is entitled to avoid trial. *Davis v. Scherer*, — U. S. — (1984); *Harlow v. Fitzgerald*, 457 U. S. 800, 815-819 (1982). This entitlement is analogous to the right to avoid trial protected by absolute immunity or by the Double Jeopardy Clause. Where the District Court rejects claims that official immunity or double jeopardy preclude trial, the special nature of the asserted right justifies immediate review. The very purpose of such immunities is to protect the defendant from the burdens of trial, and the right will be irretrievably lost if its denial is not immediately appealable. See *Helstoski v. Meanor*, 442 U. S. 500, 506-508 (1979); *Abney v. United States*, 431 U. S. 651, 660-662 (1977). I agree that the District Court's denial of qualified immunity comes within the small class of interlocutory orders appealable under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949).

Because I also agree that the District Court erred in holding that petitioner's authorization of the wiretaps in 1970 violated legal rights that were clearly established at the time, I

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