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Michael E. Solimine
University of Cincinnati College of Law

ARE INTERLOCUTORY QUALIFIED IMMUNITY APPEALS LAWFUL?

Michael E. Solimine∗

For half a century the Supreme Court has held that defendants in civil rights actions can avoid monetary liability if they demonstrate a qualified immunity for their actions. And for thirty years, the Court has held that district court denials of the qualified immunity defense are immediately appealable under the collateral order exception to the final order requirement. Controversial from the start, the qualified immunity defense has recently come under renewed stress, with calls from individual Justices and by leading voices in academia to either significantly modify or even abolish the defense. While primarily dealing with substantive aspects of the defense, this questioning also suggests a revisiting of the status quo on defendants being able to immediately appeal a denial of the defense, a task undertaken by this Essay. After briefly setting out the status quo of the qualified immunity defense, this Essay argues that the decisions permitting immediate appealability are dubious on doctrinal, functional, and institutional grounds. It further argues that the decisions should either be overruled or significantly limited, and that the Court should leave it to the rulemaking process, rather than caselaw, to carve out any exceptions to the presumption that denial of such a defense is not immediately appealable.

INTRODUCTION

In a word, no. At least not as presently constituted.

For over fifty years the Supreme Court has developed various versions of qualified immunity, available as a defense for federal and state defendants subject to suit for damages in civil rights cases.[1] And for over thirty of those years, the Court has made clear that denials by district courts of that defense are subject to an immediate appeal by the defendant under the "collateral order doctrine," despite the interlocutory nature of that trial court decision.[2] The key decision here granting that option to defendants is from 1985, in *Mitchell v. Forsyth*.[3]

∗ Donald P. Klekamp Professor of Law, University of Cincinnati College of Law. For comments on a previous draft, I thank Bryan Lammon, Janet Moore, Howard Wasserman, and participants at a faculty workshop at the University of Cincinnati College of Law.

1 For an overview of the now-considerable caselaw, see HOWARD M. WASSERMAN, UNDERSTANDING CIVIL RIGHTS LITIGATION 113–28 (2d ed. 2018).

2 *Id.* at 168–69.

3 472 U.S. 511 (1985).

Despite its longevity, the qualified immunity defense has recently come under increasing stress. Supreme Court Justices have openly questioned in opinions whether and to what extent the defense should exist at all.[4] Prominent voices in the legal academy have increasingly made similar arguments.[5] The criticisms have come from a variety of political perspectives, as demonstrated by the libertarian CATO Institute establishing a program in 2018, calling for the curtailment of the defense, for the reason that it makes it difficult to hold public officials accountable for their actions.[6]

In that now-burgeoning rethinking of the qualified immunity doctrine, only limited attention has been given to revisiting the interlocutory appeals issue. One prominent critic of the doctrine, Professor Joanna Schwartz, has argued that empirical studies do not support the putative functional reasons for the doctrine, and hence "the policy objectives motivating *Mitchell* militate in favor of eliminating the right of interlocutory appeal."[7] Based in part on her work, one federal district judge, in the course of holding that such an interlocutory appeal was frivolous, recently opined that *Mitchell* "was likely wrongly decided."[8] But these are exceptions to the rule.[9]

The substantive questioning of the qualified immunity doctrine suggests reopening the issue of the soundness of *Mitchell*, a task now undertaken in a sustained manner by this Essay, which proceeds as follows. Part I briefly surveys the history of the qualified immunity defense, and of the simultaneous holdings that trial court denials of that defense are immediately appealable under the collateral order doctrine. Part II summarizes the recent substantive critiques of the qualified immunity defense, and then turns to doctrinal, functional, and institutional reasons to revisit *Mitchell*. That Part concludes that the present status of interlocutory appeals is not defensible. Part III considers how to make interlocutory qualified

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4 *See* Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting); Ziglar v. Abbasi, 137 S. Ct. 1843, 1870–72 (2017) (Thomas, J., concurring in part and concurring in the judgment); *see also* Zadeh v. Robinson, 902 F.3d 483, 498–500 (5th Cir. 2018) (Willett, J., concurring dubitante); Thompson v. Clark, No. 14-CV-7349, 2018 WL 3128975, at *6–13 (E.D.N.Y. June 26, 2018).

5 For a sampling of the recent literature, see William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017); Symposium, *The Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 1793 (2018).

6 Will Baude, *The Cato Institute's New Civil Rights/Police Accountability Initiative*, REASON (Mar. 7, 2018), https://reason.com/volokh/2018/03/07/the-cato-institutes-new-civil-rightspoli; *see also* Alan Feuer, *Advocates from Left and Right Ask Supreme Court to Revisit Immunity Defense*, N.Y. TIMES (July 11, 2018), www.nytimes.com/2018/07/11/nyregion/qualified-immunity-supreme-court.html.

7 Schwartz, *supra* note 5, at 75.

8 Wheatt v. City of East Cleveland, No. 1:17-CV-377, 2017 WL 6031816, at *1 (N.D. Ohio Dec. 6, 2017) (citing, inter alia, Schwartz, *supra* note 5, at 7, 11), *aff'd*, 741 Fed App'x 302 (6th Cir. 2018). The Sixth Circuit affirmed the decision without commenting on the *Mitchell* issue. *Wheatt*, 741 Fed App'x 302.

9 *Cf.* Baude, *supra* note 5, at 84 (arguing that the Court has "also given qualified immunity special status as a matter of civil procedure," including favorable treatment under the collateral order doctrine).

immunity appeals lawful by taking several steps, alone or in combination. These steps include the Supreme Court overruling, or at least significantly modifying, *Mitchell* and its progeny; encouraging the use of interlocutory appeal mechanisms other than the collateral order doctrine, such as 28 U.S.C. § 1292(b) or writs of mandamus; and promoting rulemaking as an alternative to permit some of these interlocutory appeals. Any one or more of these steps would place interlocutory qualified immunity appeals on a firmer and more coherent jurisprudential footing.

I. THE QUALIFIED IMMUNITY DEFENSE AND INTERLOCUTORY APPEALS

A. Qualified Immunity

An exhaustive discussion of the history and present status of the qualified immunity defense is unnecessary here. What can be said is that the defense has its roots in common-law doctrines that seek to avoid a chilling effect on public officials who are enforcing the law, and to protect them from the distractions, costs, and burdens of civil litigation. While not textually mentioned in civil rights statutes that create private rights of actions, such as 42 U.S.C. § 1983, the defense has been assumed to be available for defendants in suits for damages brought under Section 1983 and similar causes of action.[10]

The contours of the defense have shifted over time. At one point the courts considered the defense to be primarily subjective, examining an official's belief in the lawfulness of their actions and their overall good faith.[11] But this subjective focus made it difficult for courts to definitively rule on the defense in a pretrial setting.[12] Acknowledging these problems, the Supreme Court made a key move in 1982 in *Harlow v. Fitzgerald*.[13] There, the Court observed that the subjective aspect of the then-defense was "incompatible" with the principle "that insubstantial claims should not proceed to trial."[14] The defense was thus shifted to an objective test: officials facing damage actions would be shielded from liability if their conduct did not violate "clearly established . . . rights of which a reasonable person would have known."[15]

In the three decades since *Harlow*, the Court has found it necessary to revisit the scope of the defense. Among the issues it has encountered is whether the merits of the plaintiff's case (i.e., whether their federal constitutional or statutory rights have been violated) must be resolved before determining whether the rights were clearly established; the appropriate level of specificity of the rights in question; and whether and to what extent courts can look beyond Supreme Court decisions in determining whether a right was clearly established.[16]

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10 *See generally* WASSERMAN, *supra* note 1, at 113–15.

11 *Id.* at 115.

12 *Id.*

13 457 U.S. 800 (1982).

14 *Id.* at 815–16.

15 *Id.* at 818.

16 For overviews of these issues, see WASSERMAN, *supra* note 1, at 118–25; Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937 (2018).

B. Qualified Immunity and Interlocutory Appeals

According to statute, if a trial court dismisses a case after a finding that the defendant is entitled to qualified immunity, then that is a final decision and the plaintiff has a right to appeal.[17] If the trial court rejects the defense, it is interlocutory and ordinarily not subject to an immediate appeal. The principal exception used by defendants in that circumstance is the collateral order doctrine. That doctrine originated in 1949 in *Cohen v. Beneficial Industrial Loan Corp.*,[18] which carved out an exception to the final decision statutory requirement for district court decisions "collateral" to the merits by giving the statute a "practical rather than a technical construction."[19] As articulated in later cases, the collateral order doctrine consists of a three-part test: the "small category" of decisions that fall under the doctrine are only those "that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action."[20] The doctrine is a "blunt, categorical instrument,"[21] because once an order is deemed to satisfy the test, all such orders in all cases can be immediately appealed. There is no individualized, order-by-order determination.[22]

The Court first considered the application of the collateral order doctrine with the qualified immunity defense in companion cases dated the same day in 1982: the aforementioned *Harlow* and *Nixon v. Fitzgerald*.[23] The latter case involved the assertion of an *absolute* immunity in a damages action against Richard Nixon for actions he took as President.[24] The district court had denied a summary judgment motion premised on such an immunity,[25] but the Supreme Court held that a claim of absolute immunity did satisfy the collateral order doctrine.[26] While not engaging in an extended analysis of each of the *Cohen* criteria,[27] it emphasized the "serious and unsettled" issues regarding the immunity for a President, and the "special solicitude due to claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers."[28]

Harlow was in a similar procedural posture. That case involved assertions of both absolute and qualified immunity by aides to President Nixon, and the Court eventually held that only the latter was available to the defendants.[29] The district court denied a summary judgment motion premised on the defendants' asserted

17 *See* 28 U.S.C. § 1291 (2012).

18 337 U.S. 541 (1949).

19 *Id.* at 546.

20 Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106 (2009) (quoting Swint v. Chambers Cty. Comm'n, 514 U.S. 35, 42 (1995)).

21 *Id.* at 112 (quoting Dig. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 883 (1994)).

22 *See id.* at 112–13.

23 457 U.S. 731 (1982).

24 *Id.* at 748.

25 *Id.* at 740–41.

26 *Id.* at 742–43.

27 It is worth pointing out that the Court noted that in other cases it had already "held that orders denying claims of absolute immunity [were] appealable under the *Cohen* criteria." *Id.* at 742.

28 *Id.* at 743.

29 Harlow v. Fitzgerald, 457 U.S. 800, 807–13 (1982).

immunities, and the defendants invoked the collateral order doctrine to immediately appeal.[30] The Court held that they could do so.[31] It only briefly discussed the issue, holding that an immediate appeal was possible for the same reason it was allowed in *Nixon*.[32]

Although *Mitchell* was in turn similarly situated to *Harlow*, in that it involved a civil rights action against another official in the Nixon administration (Attorney General John Mitchell), the Court fully addressed the issue of the applicability of the collateral order doctrine to the qualified immunity defense.[33] It advanced several reasons why the elements of the doctrine are satisfied for qualified immunity interlocutory appeals. For one, it emphasized the reconceptualization of the defense in *Harlow*, pointing out that *Harlow* held that the defense was necessary to, among other things, avoid government officials being distracted from duties, including both the burdens of trial and avoiding pretrial matters like discovery.[34] As the Court saw it, *Harlow* "thus recognized an entitlement not to stand trial or face the other burdens of litigation," and thus was an "*immunity from suit* rather than a mere defense to liability."[35] Thus, like appeals from denials of absolute immunity, a denial is "effectively unreviewable on appeal from a final judgment."[36] The Court also held that a "claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated."[37] The Court explained that the immunity claim was an issue of law, namely, whether the "legal norms" the defendant allegedly violated were "clearly established" at the time, even though, the Court conceded, it would entail a consideration of the factual allegations.[38]

Justice Brennan dissented at length on the appealability issue. Emphasizing the narrowness of the collateral order doctrine, he focused on the second and third prongs.[39] On the former, he argued that while the qualified immunity question "is not identical to the ultimate question on the merits, the two are quite closely related."[40] A trial court, he continued, "seeking to answer either question would refer to the same or similar cases and statutes, would consult the same treatises and secondary materials, and would undertake a rather similar course of reasoning."[41] It

30 *Id.* at 806.

31 *Id.* at 806 n.11.

32 *Id.*

33 Mitchell v. Forsyth, 472 U.S. 511, 524–30 (1985). Lower courts post-*Harlow* did not consider that decision to have resolved the issue. The *Mitchell* Court pointed out a circuit split on the issue. *Id.* at 519 & n.5. For further discussion of the uncertainty in the lower courts on this issue following *Nixon*, see 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3914.10, at 649 (2d ed. 1992).

34 *Mitchell*, 472 U.S. at 526.

35 *Id.*

36 *Id.* at 526–27.

37 *Id.* at 527–28.

38 *Id.* at 528.

39 *Id.* at 544–45 (Brennan, J., concurring in part and dissenting in part).

40 *Id.* at 545.

41 *Id.* He added that he did not believe that "mere 'factual overlap' [was] sufficient to show lack of separability," but rather, "it [was] the *legal* overlap between the qualified immunity question and the merits of the case that renders the two questions inseparable." *Id.* at 546 n.2 (internal citation omitted).

was not clear, he concluded, that there was a "conceptual distinction" between qualified immunity and the merits, much less that they were sufficiently separate from each other.[42]

On the "effectively unreviewable" prong, Brennan argued that the majority was reading too much into *Harlow*'s adoption of an objective standard.[43] While that standard was meant to give extra protection to public officials, he argued that *Harlow* did not answer the question of "need we . . . take the extraordinary step of excepting such officials from the operation of the final judgment rule?"[44] He pointed out that many types of immunities, and other dispositive issues such as a statute of limitations or lack of jurisdiction, will be lost if not immediately reviewed.[45] While granting that the opportunity for an immediate appeal would benefit officials, he predicted it would impose "enormous costs on plaintiffs and on the judicial system as a whole."[46] "[R]egardless of the merits of his claim to qualified immunity," he lamented, the new right of appeal is a "potent weapon to use against plaintiffs," and "can be expected to be widely pursued."[47]

Two other decisions round out the Court's jurisprudence on the collateral order doctrine in this context: one restricts the right of appeal, the other expands it. In 1995, the Court held in *Johnson v. Jones*[48] that *Mitchell* did not extend to any disputes over the facts that could be inferred from the record. So if the defendants based their qualified immunity defense on, say, a motion for summary judgment, and the plaintiff responded by raising a genuine dispute as to a material fact, then an interlocutory appeal would need to be dismissed.[49] A year later, the Court held in *Behrens v. Pelletier*[50] that a defendant could potentially pursue multiple interlocutory appeals of the qualified immunity issue. There, a defendant was permitted to appeal successive denials of Rule 12(b)(6) and summary judgment motions based on that defense.[51]

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42 *Id.* at 547–50.

43 *Id.* at 551–54.

44 *Id.* at 551–52. It is worth mentioning that Brennan did not dissent in *Harlow*, though his concurring opinions in that case make no direct mention of the appealability issue. Harlow v. Fitzgerald, 457 U.S. 800, 820–21 (1982) (Brennan, J., concurring); *id.* at 821–22 (Brennan, White, Marshall & Blackmun, JJ., concurring).

45 *Mitchell*, 472 U.S. at 552–53 (Brennan, J., concurring in part and dissenting in part). He added that instead of permitting collateral order appeals in all cases, many cases "may well be appealable as certified interlocutory appeals under 28 U.S.C. § 1292(b) or, less likely, on writ of mandamus." *Id.* at 554.

46 *Id.* at 555.

47 *Id.* at 555–56.

48 515 U.S. 304 (1995).

49 *Id.* at 319–20; *see also* Plumhoff v. Rickard, 572 U.S. 765, 773 (2014) (distinguishing *Johnson* as a case involving "evidence sufficiency," and disputed factual issues, and not legal issues, a "core responsibility of appellate courts" (quoting *Johnson*, 515 U.S. at 314)).

50 516 U.S. 299 (1996).

51 *Id.* at 308–10. Around the same time the Court held that pendent appellate jurisdiction could not be used to obtain interlocutory jurisdiction over nonfinal orders, even if such orders were intertwined with qualified immunity issues. Swint v. Chambers Cty. Comm'n, 514 U.S. 35, 38 (1995).

II. REVISITING QUALIFIED IMMUNITY AND INTERLOCUTORY APPEALS

As mentioned at the outset of this Essay, recently there has been a burst of doctrinal and institutional critiques of the qualified immunity doctrine.[52] For example, Professor Will Baude argues that legal justifications are lacking. Thus, he argues that, among other things, there is no historical basis for the immunity (it only developed, he says, after the passage of Section 1983); it shouldn't be regarded as compensation for arguably mistaken, proplaintiff interpretations of civil rights statutes; and it's not justifiable as akin to a rule of lenity for governmental officials.[53] Empirical studies by Schwartz have, as she sees it, undermined the policy justifications advanced by the Court for the doctrine, to protect public officials from the financial and distractive burdens of responding to civil rights litigation. Her studies have shown that the vast majority of defendants do not pay money judgments or settlements, due to employer indemnity or other factors.[54] Likewise, only small percentages of cases are dismissed solely on qualified immunity grounds.[55]

These critiques do not map directly on the propriety of allowing interlocutory appeals in qualified immunity cases, which focuses on the relationship between trial and appellate courts, and the wisdom of placing power in the hands of appellants. The competing concerns are well settled: an interlocutory appeal can disrupt trial proceedings and cause delay and increased costs for the litigants. It also risks additional and possibly unnecessary work for appellate courts, since an immediate appeal may be on a less developed record, and a ruling there may be moot in light of what might happen at trial. The countervailing consideration is that the decision sought to be immediately reviewed may be wrong, may improperly (in hindsight) burden the course of trial proceedings, and would benefit from immediate correction. While the respective considerations are different, the recent criticisms of the substance of qualified immunity suggest the need for revisiting the procedural apparatus of litigating the defense, particularly when the Court has seemingly given privileged status to that litigation.[56] I next consider doctrinal, functional, and institutional criticisms of the current state of interlocutory appeals of the defense.

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52 *Cf.* Samuel L. Bray, *Foreword: The Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 1793, 1794–96 (2018) (labeling critiques as, among other things, historical, doctrinal, functional, and institutional).

53 Baude, *supra* note 5, at 49–77. This article has been cited by recent decisions. *See* Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting); Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment); Zadeh v. Robinson, 902 F.3d 483, 499 n.11 (5th Cir. 2018) (Willett, J., concurring dubitante); Thompson v. Clark, No. 14-CV-7349, 2018 WL 3128975, at *10–11 (E.D.N.Y. June 26, 2018).

54 Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1804–08 (2018).

55 *Id.* at 1808–09.

56 *See* Baude, *supra* note 5, at 84–86 (discussing how the Court has given inordinate attention to qualified immunity cases through its "shadow docket," e.g., frequent summary reversals).

A. The Collateral Order Doctrine

Rarely is the collateral order doctrine discussed without being the subject of disparagement.[57] While ostensibly a "practical construction" of the final order statute, it is not obvious how the elaborate three-part test can be derived from the spare language of that statute.[58] More than that, the Court is frequently taken to task for its arguably strained and inconsistent applications of the three-part test. This is especially true of the second (the issue being separate from the underlying merits) and third (issue must be effectively unreviewable on appeal from a final judgment) prongs of the test.[59]

The poster child for this criticism has been *Mitchell*. Brennan's arguments that the second and third parts of the test were not satisfied have, to many observers, stood the test of time. Consider the former, the assertion that the qualified immunity defense is conceptually distinct from the merits of the case. The defense, in its *Harlow* formulation of not violating clearly established law, overlaps in most cases with the law and facts of the merits of the case.[60] The Court has relieved some of its own conceptual problems with this distinction by holding that a qualified immunity based on disputed facts cannot be the basis of an interlocutory appeal, though the scope of that exception is not clear.[61]

Recall that Brennan in his *Mitchell* dissent predicted that courts would consult the same or similar legal sources, and engage in similar reasoning, when discussing the defense and the merits.[62] His prediction has largely been borne out. Consider those cases where, because of the procedural posture of the case, the Court has

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57 Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Review*, 93 WASH. L. REV. 1809, 1842 & n.180 (2018) ("Indeed, it is probably the most maligned rule of federal appellate jurisdiction." (citing Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423, 431 (2013))).

58 *See* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 116 (2009) (Thomas, J., concurring); Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1184 (1990); *see also* Baude, *supra* note 5, at 84 (referring to the "so-called collateral order doctrine").

59 Lammon, *supra* note 57, at 1842 (summarizing the criticisms). For a sampling of the extensive literature on the collateral order doctrine, see Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 DRAKE L. REV. 539 (1998); Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423, 447–59 (2013); Aaron R. Petty, *The Hidden Harmony of Appellate Jurisdiction*, 62 S.C. L. REV. 353, 377–86 (2010). The Court lost an opportunity in the 2017 Term to revisit the collateral order doctrine. After granting certiorari to resolve the issue of whether a denial of the state action immunity defense to antitrust liability was immediately appealable under the doctrine, the case was settled and the writ of certiorari dismissed. *See* Salt River Project v. Tesla Energy Operations, Inc., 138 S. Ct. 1323 (2018) (dismissing certiorari). The author of this Essay was a signatory to an amicus curiae brief that argued that the doctrine did not permit an interlocutory appeal in this instance. *See generally* Brief of Federal Courts Scholars as Amici Curiae in Support of Respondent, *Salt River*, 138 S. Ct. 1323 (No. 17-368).

60 *See* WRIGHT ET AL., *supra* note 33, § 3911.2, at 388 ("Conceptual distinctness is a good distance removed from full separability."); Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 855 (2018).

61 *See* Lammon, *supra* note 57, at 1845–48; *supra* notes 48–49 and accompanying text.

62 *See supra* note 41 and accompanying text.

discussed *both* the merits *and* the qualified immunity defense. It is true that in those cases, the discussion in the respective parts of the opinion are not identical. On the merits, the Court discusses whether, based on constitutional principles up to the time of the decision, there was a constitutional violation.[63] In contrast, the defense will be predicated on Supreme Court (and perhaps lower court) decisions that focus on whether that right was "clearly established" on the day of the alleged violation.[64] Both parts of these opinions discuss, in very similar ways, the same facts, and the substantive constitutional principles at stake (though at different levels of generality). It is difficult to label these as separate issues in any meaningful sense of the term.

Mitchell does not fare much better under the third prong, that the qualified immunity issue is effectively unreviewable after an appeal of a final judgment. That is true, but it is also true of many other issues where review is sought under the collateral order doctrine.[65] To better defend the arcane distinctions it has drawn in the third factor, the Court has also emphasized the "importance" of the issues involved, and in particular the putative public interests (if any) underlying that issue.[66] Put another way, the importance of an issue is another way of saying that it is driven by policy concerns. From that perspective, it can be said that the qualified immunity defense is indeed important: it's a frequently litigated defense for public officials in civil rights actions. More than that, *Nixon* and *Harlow*, at least implicitly, were predicated on separation of powers concerns, given that the defendants had been very high-ranking officials in the executive branch. When qualified immunity is considered as a potential defense in the many Section 1983 actions brought against state officials, then federalism concerns are raised.[67] One can concede those points without necessarily agreeing that *all* cases raising the qualified immunity defense should automatically fall under the collateral order doctrine. Given the origins of the current version of the defense in actions against high-ranking *federal* officials, perhaps the doctrine should only apply to suits against federal officials (and maybe not even all of them at that). In contrast, it should not automatically follow that

63 *See, e.g.*, District of Columbia v. Wesby, 138 S. Ct. 577, 585–89 (2018) (discussing merits of alleged Fourth Amendment violation); Plumhoff v. Rickard, 572 U.S. 765, 773–77 (2014) (same).

64 *See e.g.*, *Wesby*, 138 S. Ct. at 589–92 (discussing whether alleged Fourth Amendment violated clearly established law at time of the violation); *Plumhoff*, 572 U.S. at 777–81 (same).

65 *See* WRIGHT ET AL., *supra* note 33, § 3911, at 346; Baude, *supra* note 5, at 87; Solimine, *supra* note 58, at 1188.

66 Dig. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 881 (1994); *see* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 109 (2009); *see also* Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 502 (1989) (Scalia, J., concurring) (third factor turns on whether "the law . . . deem[s] the right *important enough* to be vindicated by . . . interlocutory appeal."); RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 1103 (7th ed. 2018) ("Does the comment of Justice Scalia in *Lauro Lines* suggest that the Court has embarked on a process of ad hoc balancing that focuses on the Court's perception of the importance of the interest in avoiding trial?"); *cf.* WRIGHT ET AL., *supra* note 33, § 3911.5, at 430 ("The 'important question' element of collateral order doctrine . . . has had a checkered career.").

67 *See* Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405 (2019) (discussing separation of powers and federalism aspects of qualified immunity).

Mitchell applies to all (or perhaps any) of the many civil rights actions against state officials.[68]

B. Functional Considerations

Not completely unrelated to the last point about the "importance" of the issue in the collateral order doctrine analysis is the argument that overtly pragmatic or functional concerns do, or should, inform the application of that doctrine (or other exceptions to the final judgment rule).[69] From that perspective, allowing interlocutory appeals of the qualified immunity defense could turn on an assessment of the actual litigation of the defense in trial and appellate courts, such as how often and with what success the defense is raised in those fora. In that regard, it seems to be an article of faith among scholars and civil rights practitioners that the qualified immunity defense is raised in almost all cases at the trial level, is frequently granted in those courts,[70] and that an interlocutory appeal is necessary for appellate courts to fully secure the defense.[71]

But as Schwartz has argued, the empirical evidence from various studies addressing these points is a mixed bag; some support the assumptions, others do not.[72] Her own study, of district courts in five circuits over a three-year period, showed that while the qualified immunity defense was frequently raised by motions to dismiss or for summary judgment, the rate of granting of those motions was not high, and even when granted, the entire case was frequently not dismissed due to other claims being brought.[73] Likewise, about twenty-two percent of denials of motions on immunity grounds were appealed, and of those, about one-third were affirmed, twenty percent were reversed in whole or in part, and the balance were withdrawn.[74] On the basis of the latter data, Schwartz argues that because it "is far from clear that interlocutory appeals shield defendants from litigation burdens . . .

68 Most collateral order decisions do not speak in terms of separation of powers or of federalism. For two cases that do refer to separation of powers, see Cheney v. U.S. Dist. Court, 542 U.S. 367 (2004); Nixon v. Fitzgerald, 457 U.S. 731 (1982). In the former decision, the Court granted a mandamus petition to review and reverse on an interlocutory order on discovery. *Cheney*, 542 U.S. at 376, 378. Ordinarily, the Court held, such orders would not be subject to interlocutory appellate review, but "separation-of-powers considerations should inform a court of appeals' evaluation of a mandamus petition involving the President or the Vice President." *Id.* at 381–82.

69 WRIGHT ET AL., *supra* note 33, § 3913 (discussing pragmatic finality); *see also* Palmer v. City of Chicago, 806 F.2d 1316, 1318–19 (7th Cir. 1986), *cert. denied*, 481 U.S. 1049 (1987); Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89 (1975); Solimine, *supra* note 58, at 1188–89.

70 *See, e.g.*, Schwartz, *supra* note 5, at 6–7; *see also* Alphonse A. Gerhardstein, *Making a Buck While Making a Difference*, 21 MICH. J. RACE & L. 251, 263–64 (2016) (noting that in "almost every case litigated against government officials under § 1983, dispositive motions and appeals based on qualified immunity arise").

71 *See* Schwartz, *supra* note 5, at 17–18, 74–75.

72 *See id.* at 7–8.

73 *Id.* at 36–39 (reporting data from district courts).

74 *Id.* at 40–41. She also reports that plaintiffs appealed about 33% of grants of motions based on the immunity, and of those, 65% were affirmed, 8% reversed, and 27% were withdrawn. *Id.* at 41.

the policy objectives motivating *Mitchell* militate in favor of eliminating the right of interlocutory appeal."[75]

Schwartz's empirical study itself might cut different ways regarding the propriety of *Mitchell*. If the qualified immunity defense does not "play[] a controlling role in the resolution"[76] of as many civil rights cases as is commonly thought in some circles, then perhaps the status quo is not intolerable. On the other hand, the defense is frequently raised at the trial court level, and whatever the statistics may show, plaintiffs' lawyers report that much of their litigation strategy is taken up with preparing to defeat the defense, at both the trial and appellate levels.[77] Similarly, anecdotal evidence from district judges suggests that they see the raising of the defense as frequently done for mere delay.[78] More empirical work on these issues would shed further light, but the current research suggests that the appellate regime is not marked by excessive rates of appeal or of reversal.[79] To that extent, the putative need for *Mitchell* and it progeny starts to fade.

C. Institutional Considerations

Court decisions holding the collateral order doctrine not satisfied frequently engage in reasoning relevant to the continued viability of *Mitchell*. For example, in *Mohawk Industries, Inc. v. Carpenter*, a unanimous Court in 2009 held that a district court order finding the attorney-client privilege to be waived did not fall under the doctrine.[80] In the course of that ruling, the Court stated that "[p]ermitting parties to undertake successive, piecemeal appeals of all [such adverse] rulings would unduly delay the resolution of district court litigation and needlessly burden the courts of appeals."[81] (For some, that is a good description of the result of *Mitchell* and its progeny.) Moreover, the Court extolled the benefits of other types of interlocutory review, including those by 28 U.S.C. § 1292(b), contempt, and mandamus.[82] While conceding that these other avenues were not the same as a collateral order appeal, they would "facilitate immediate review of some of the more consequential attorney-client privilege rulings."[83] Indeed, the differences were a virtue. Those other

75 *Id.* at 75. *See also* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 110 (2009) (referring to unlikelihood of a particular type of order (there, the waiver of the attorney-client privilege) being reversed as a factor in not holding the collateral order doctrine to be satisfied).

76 Schwartz, *supra* note 5, at 8.

77 *See, e.g.*, Gerhardstein, *supra* note 70, at 263–66.

78 Schwartz, *supra* note 5, at 75 n.223 (citing Solimine, *supra* note 58, at 1191).

79 I previously conducted an empirical study of the reversal rate found in appellate qualified immunity decisions from all of the circuits from 1987 to 1989. Solomine, *supra* note 58, at 1189. I found the rate of reversal, in whole or in part, was about 70%. *Id*. at 1190. While I conceded that this relatively high reversal rate, standing alone, might support the need for *Mitchell*-type interlocutory appeals, "the inflexible nature of such appeals—the circuit court *must* hear the case—will still burden trial and appellate courts." *Id.* The relatively high rate of reversals I found might be due, in part, to the fact that I did not study officially unpublished decisions, which typically have a much higher affirmance rate. *See id.* at 1198.

80 *Mohawk*, 558 U.S. at 103.

81 *Id.* at 112.

82 *Id.* at 110–12.

83 *Id.* at 112.

interlocutory avenues would not capture all such rulings, but the "blunt, categorical instrument" of applying the collateral order doctrine "cannot justify the likely institutional costs."[84] Other Court decisions regarding appeals often offer similar praise for these alternative avenues.[85]

Mohawk mentioned another reason for a narrow construction of the collateral order doctrine. It observed that Congress in 1990 and 1992 had amended the Rules Enabling Act to permit rulemaking on the issue of what district court decisions can be subject to an interlocutory appeal.[86] Rulemaking, the Court added, has the "important virtues" of drawing "on the collective experience of bench and bar . . . and it facilitates the adoption of measured, practical solutions."[87] Again, other Court decisions have extolled the benefits of rulemaking to better solve disputes over the propriety of interlocutory appeals.[88]

These institutional factors make continued adherence to *Mitchell* untenable. The amendments to the Rules Enabling Act were enacted as a result of a suggestion by the Federal Courts Study Committee in 1990, which thought that the confusing and complex law on interlocutory appeals could benefit from rulemaking "(by broadening, narrowing, or systematizing) decisional results under the finality rule of 28 U.S.C. § 1291."[89] While one does not need to draw the conclusion that the legislation immediately overrules or limits *Mitchell* and its progeny, it strongly suggests that further application or refinement of that decision ought to be deferred in lieu of serious consideration of rulemaking on the subject.[90]

Yet another reason to revisit *Mitchell* is the availability of § 1292(b) appeals. That provision requires that both the district judge and the court of appeals certify an interlocutory order for immediate appeal. It further states that an order must involve "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."[91] Some, but certainly not all, denials of the qualified immunity defense could, and should,[92] be certified by a

84 *Id.* (citing Dig. Equip. Corp., v. Desktop Direct, Inc., 511 U.S. 863, 883 (1994)).

85 *E.g.*, Gelboim v. Bank of Am. Corp., 135 S. Ct. 897, 906 (2015).

86 *Mohawk*, 558 U.S. at 113–14 (referring to the Judicial Improvements Act of 1990, Pub. L. 101-650, § 315, 104 Stat. 5089, 5115 (codified as amended at 28 U.S.C. § 2072(c) (2012)), and the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (codified as amended at 28 U.S.C. § 1292(e))).

87 *Id.* at 114.

88 *E.g.*, Hall v. Hall, 138 S. Ct. 1118, 1131 (2018); Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1714–15 (2017).

89 FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 95–96 (1990). It should be noted that the Report makes no reference to *Mitchell* or any other decision. For an extensive discussion of this aspect of the Report and of the 1990 and 1992 legislation, see Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717 (1993).

90 *Cf. Mohawk*, 558 U.S. at 119 (Thomas, J., concurring) (calling on the Court to "limit" the collateral order doctrine in light of the 1990 and 1992 legislation, though not making clear if the doctrine should be entirely abandoned).

91 28 U.S.C. § 1292(b) (2012).

92 *See* Solimine, *supra* 58, at 1193–209 (criticizing decisions that have limited § 1292(b) to "big cases" or otherwise narrowly interpreted it and calling for increased use of the provision).

district judge and the court of appeals under § 1292(b). It could include those denials where the underlying constitutional right, or whether it is clearly established (or both), are contestable issues in light of caselaw; where the defense is one of law (i.e., not based on contested facts); and where an immediate appeal would likely resolve the entire case (i.e., there are no other colorable causes of action which do not involve the defense). This is precisely the sort of nuanced, case-by-case treatment appropriate for interlocutory appeals, not the one-size-fits-all regime of *Mitchell*. Indeed, prior to *Mitchell*, courts were employing § 1292(b) to permit interlocutory appeals of some denials of the defense.[93] That is a good model to return to.[94]

Finally, interlocutory appeals could be predicated on the narrow mandamus option. The Supreme Court did so to review a discovery order involving the sitting Vice President in *Cheney v. United States District Court*, emphasizing separation of powers concerns.[95] For extraordinary and unusual situations, a writ of mandamus could be granted for qualified immunity. *Mitchell* itself, with its executive branch parallels to *Cheney*, seems an obvious candidate for granting a writ to review the assertion of the qualified immunity defense. On the other hand, the mandamus avenue is much less likely to apply to the denial of the immunity in, say, an ordinary civil rights action against a state official.

III. MAKING INTERLOCUTORY QUALIFIED IMMUNITY APPEALS LAWFUL

This Essay has already previewed how interlocutory appeals in qualified immunity cases can be placed on a more justified jurisprudential footing. This Part more explicitly considers what can be done to reform the current legal regime. Addressed in greater detail here are overruling or limiting *Mitchell*, sanctioning frivolous appeals, and engaging in rulemaking.

One path would simply be to overrule *Mitchell*, leaving intact other avenues of interlocutory appeals for possible use.[96] That bold step is unlikely, not least of all

93 *See, e.g.*, McSurely v. McClellan, 697 F.2d 309, 316–17 n.12 (D.C. Cir. 1982) (per curiam); Johnson v. Alldredge, 488 F.2d 820, 822 (3d Cir. 1973).

94 In *Mitchell* itself, the district court, at an earlier stage of the litigation, had refused to certify a § 1292(b) appeal on the qualified immunity defense. Forsyth v. Kleindienst, 599 F.2d 1203, 1208 (3d Cir. 1979). In their eventual briefing in the Supreme Court, it is interesting to note that the plaintiffs argued that the district judge was correct to deny a § 1292(b) request, given what it perceived to be lengthy delays in the case, *see* Brief for the Respondent at 16 n.8, Mitchell v. Forsyth, 472 U.S. 511 (1985) (No. 84-335), while the defendant chastised the district court for *not* certifying a § 1292(b) appeal, given what it called the "weighty contrary authority" on the merits of the defense. Brief for the Petitioner at 23–24, *Mitchell*, 472 U.S. 511. In a footnote, the latter brief favorably cited a lower court opinion which had used § 1292(b) to hear a qualified immunity appeal. *Id.* at 24 n.13 (citing *McSurely*, 697 F.2d 309). The majority in *Mitchell* made no mention of § 1292(b); Brennan's dissent did. *See Mitchell*, 472 U.S. at 554 (Brennan, J., concurring and dissenting in part).

95 Cheney v. U.S. Dist. Court, 542 U.S. 367, 382 (2004).

96 It may be churlish to point out that *Mitchell* was a 4–3 decision, with two Justices (Rehnquist and Powell) not participating, and for that reason it might be regarded as entitled to less precedential weight. *Cf.* N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 615–17 (1975) (Blackmun, J., dissenting) (unfavorably commenting on prior decision as being 4–3). *See generally* Thomas M. Burke, Note, *Is a 4-3 Decision of the United States Supreme Court the "Supreme Law of the Land"?*, 2 FLA. ST. U. L. REV. 312 (1974).

due to collateral order decisions being ostensibly based on statutory interpretation. The Court is generally reticent to overrule its statutory interpretation decisions as compared to constitutional law decisions on the theory that Congress can more easily respond to the former.[97] Yet, as mentioned, Congress has in effect already responded by the 1990 and 1992 legislation authorizing rulemaking to determine the existence and scope of interlocutory appeals. So that should make *Mitchell* a less secure precedent.

A lesser and more realistic alternative to overruling *Mitchell* would be to judicially limit its scope.[98] One way to do this would be to read *Mitchell* as *not* inexorably applying to every single qualified immunity appeal. This would change the "blunt instrument" aspect of the doctrine, and instead permit an appellate court to engage in a nuanced analysis of whether a *particular* interlocutory appeal should be permitted.[99] Such an analysis could be informed by such factors as the suggested applicability of § 1292(b) to these appeals, mentioned above. Other factors could also be considered, such as the overall legal and factual complexity of the qualified immunity issues, the status of defendant official (federal or state, and the particular type of office), and the presence of other issues, among other things.

A second reform would be to emphasize the current practice of trial and appellate courts being able to sanction frivolous appeals. The Supreme Court in *Behrens v. Pelletier* favorably referred to this authority,[100] and some lower courts have not been hesitant to utilize it.[101] As *Behrens* pointed out, designating an appeal as frivolous can be coupled with the district court retaining jurisdiction and litigating other aspects of the case "pending [presumably] summary disposition of the appeal."[102] This reform could leave *Mitchell* intact for meritorious appeals while ameliorating its deleterious impact on both trial and appellate courts.

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97 *See* Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 165–66 (2018).

98 Showing that this alternative is not inconceivable are statements in Court opinions evincing discomfort with the collateral order doctrine in general and (arguably) *Mitchell* in particular. Thus, even while applying *Mitchell*, a majority of the Court acknowledged that "[a]s a general matter, the collateral order doctrine may have expanded beyond the limits dictated by its internal logic and the strict application of the criteria set out in *Cohen*." Ashcroft v. Iqbal, 556 U.S. 662, 672 (2009) (5–4, but the dissenters did not address the *Cohen* issue); *see also* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 115, 117 (2009) (Thomas, J., concurring) (twice referring to the *Ashcroft* passage above favorably).

99 One doctrinal path to limiting (or eliminating) the purely categorical approach would be to emphasize, as the Court once did, that collateral orders are only those dealing with "serious and unsettled questions." Nixon v. Fitzgerald, 457 U.S. 731, 742–43 (1982); *see also* Schwartz, *supra* note 54, at 1834 (arguing that the defense could be substantively limited by permitting courts "to consider whether qualified immunity would achieve its intended policy goals in particular cases").

100 Behrens v. Pelletier, 516 U.S. 299, 310–11 (1996).

101 *See, e.g.*, McDonald v. Flake, 814 F.3d 804, 816–17 (6th Cir. 2016); Wheatt v. City of East Cleveland, No. 1:17-CV-377, 2017 WL 6031816, at *2–3 (N.D. Ohio Dec. 6, 2017), *aff'd*, 741 Fed. App'x 302 (6th Cir. 2018); Hopper v. Montgomery Cty. Sheriff, No. 3:14-CV-158, 2017 WL 4870216, at *2 (S.D. Ohio Feb. 21, 2017) (discussing whether district courts have the power described in the text).

102 *Behrens*, 516 U.S. at 310–11; *see also* Centeno v. City of Fresno, No. 1:16-CV-00653, 2018 WL 1305764, at *2 (E.D. Cal. March 13, 2018) (discussing whether interlocutory appeal of denial of qualified immunity is frivolous in context of granting stay of action pending appeal);

Finally, the rulemaking process could be engaged to abolish or change the current regime. The Advisory Committee on Appellate Rules has considered proposing rules to codify (and possibly modify) the collateral order doctrine, but in 2017 decided not to further pursue the topic.[103] If that effort were revived, at least two avenues for *Mitchell*-type appeals are possible. One could be to list the types of orders that could be subject to immediate review, codifying or modifying the current caselaw with respect to the presence of factual issues, the number of appeals possible in one case, and the like.[104] Another avenue would take as a model the one rule that has been promulgated under the 1990 and 1992 legislation: Federal Rule of Civil Procedure 23(f), which gives circuit courts discretion to immediately review decisions granting or denying class certification.[105] No criteria are set out in the rule, but appellate courts have developed factors such as whether the class certification decision raises novel or unusual legal issues, would effectively terminate the case (e.g., if a plaintiff could not realistically proceed with a case absent class certification, or a defendant would be subject to disproportionate pressure to settle if a class was certified), and at least a preliminary consideration of the likelihood of succeeding on the merits (i.e., reversing the decision below).[106] Similarly, a rule for the present topic might vest discretion in the appellate courts to hear interlocutory qualified immunity appeals, and the circuit courts could develop nuanced criteria to exercise that discretion in a common-law-like way. The criteria could be informed by those suggested above for application of § 1292(b), or for a more nuanced application of *Mitchell* itself.

CONCLUSION

Any type of interlocutory appeal unavoidably raises difficult issues of balancing the principles of maintaining the efficiencies of the normal trial and appellate process with correcting trial court errors and doing justice for litigants. Interlocutory appeals of the qualified immunity defense are no different, and a perfect resolution of whether and to what extent to permit such appeals is impossible.[107] What can be said is that the current regime, automatically permitting

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Gerhardstein, *supra* note 70, at 264–66 (discussing various strategies for plaintiff's attorneys in civil rights action to dismiss or ameliorate the impact of interlocutory appeals on qualified immunity).

103 *See* Lammon, *supra* note 57, at 1824 n.86 (citing ADVISORY COMM. ON APPELLATE RULES, MINUTES OF SPRING 2017 MEETING 10 (2017), http://www.uscourts.gov/sites/default/files/ap05-2017-min_0.pdf).

104 *See, e.g.*, Anderson, *supra* note 59, at 613–14 (proposing that rulemaking overrule *Mitchell*, or at least overrule *Behrens* and only permit one interlocutory appeal); Arielle Herzberg, Comment, *"The Right of Trial by Jury Shall Be Preserved": Limiting the Appealability of Summary Judgment Orders Denying Qualified Immunity*, 18 U. PA. J. CONST. L. 305, 316 (2015) (proposing interpretation of *Johnson v. Jones* but not precise language of any Rule to embody it).

105 FED. R. CIV. P. 23(f).

106 *See, e.g.*, *In re* Johnson, 760 F.3d 66, 71 (D.C. Cir. 2014); *In re* Delta Air Lines, 310 F.3d 953, 959–61 (6th Cir. 2002) (per curiam); Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd., 262 F.3d 134, 139–40 (2d Cir. 2001).

107 *See* WRIGHT ET AL., *supra* note 33, § 3914.10, at 656 ("There is no logic to accommodate these conflicting impulses. . . . [B]ut no resolution—not even an eventual frustrated overruling of

all such appeals with virtually no intervention possible at the gatekeeping stage by district or appellate courts, is on jurisprudentially weak grounds. As courts and policymakers revisit the substance and procedure of the qualified immunity defense they should also revisit the *Mitchell* decision and its progeny to permit *some* interlocutory appeals in a nuanced manner.

the Mitchell decision—can resolve the conflict between our simultaneous desires to hold public officials to standards of law behavior, to protect public officials who have behaved reasonably against the many burdens required to establish reasonableness through the full trial process, and to maintain the values served by the final judgment rule.").