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IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 79-880

HENRY KISSINGER, *et al.*,
Petitioners,

v.

MORTON HALPERIN, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

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STATEMENT OF THE CASE

A. Introduction.

On May 13, 1969, agents of the Federal Bureau of Investigation, acting at the direction of petitioners Nixon, Mitchell, and Kissinger, installed a warrantless wiretap on the Halperin family's home telephone. Although the purported purpose of the surveillance was to determine whether Morton Halperin was the source of unauthorized "leaks" of classified information, no such evidence was

gathered, and it is undisputed that the wiretap revealed nothing which cast doubt on Halperin's loyalty or discretion. (Pet. App. 59a; II J.A. 248, 253.) Nonetheless, petitioners continued the surveillance for twenty-one months and made no effort to limit it to conversations that might have been related to leaks. Consequently numerous conversations concerning personal and political matters were overheard, summarized, and disseminated. Among the items reported to the White House were conversations relating to Senator Muskie's presidential campaign and the views of Republican Senators on legislation relating to the war in Indochina. (I J.A. 254-255.)

The Halperin surveillance was the longest in a program conducted by petitioners that included seventeen wiretaps on thirteen government officials and four journalists.¹ In its summary of evidence supporting impeachment of petitioner Nixon, the House Judiciary Committee found that these wiretaps served "no lawful purpose of his office; they had no national security objective, although he falsely used a national security pretext to attempt to justify them. Information obtained from this surveillance was used by his subordinates, with his authorization or permission, for his political advantage; and the FBI records of electronic surveillance were concealed at his direction."² A Senate investigation found that the entire program "did not reveal the source of any leaks of classified data. . . but it did generate a wealth of information about the personal

¹Minority Memorandum on Facts and Law, Hearings Before the House Judiciary Committee Pursuant to H. Res. 803, Authorizing and Directing the Committee to Investigate Whether Sufficient Grounds Exist for the House of Representatives to Impeach Richard M. Nixon, 93 Cong. 2d Sess. 62, 71 (July 22, 1974).

²Report of the House Committee on the Judiciary: Impeachment of Richard M. Nixon, H. R. Rep. No. 93-1305, 93 Cong. 2d Sess. 146 (1974).

lives of the targets — their social contacts, their vacation plans, their employment satisfactions and dissatisfactions, their marital problems, their drinking habits, and even their sex lives [as well as] [v]ast amounts of political information”³

Petitioners contend that despite the broad and intrusive nature of the Halperin wiretap, they are not liable in damages to respondents for their decisions to initiate and continue the surveillance because they are absolutely immune and because they violated no law that was clearly established at the time of the wiretap. Because petitioners' brief states the facts in a highly selective fashion, it is necessary to provide the Court with a more complete history of the relevant events against which to measure petitioners' legal arguments.

B. The Wiretap.

The wiretapping program had its genesis in late April or early May 1969, when Nixon, Mitchell, and Kissinger, in consultation with FBI Director Hoover, decided that such a program was necessary to identify the source of leaks to the press. (Pet. Br. 1-3.) Nixon directed Kissinger to provide to the FBI names of individuals who had access to leaked information and who were suspected of leaking. (II J.A. 19, 61-62, 160.) Nixon further directed that Mitchell approve the wiretaps before the FBI initiated them. (II J.A. 61-63.) The reports from the surveillance were originally sent to Nixon, Kissinger, and occasionally Mit-

³Final Report of the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities, S. Rep. 94-755, 94th Cong., 2d Sess., Book II, 200 (1976). The committee also found that “[a]mong those who were incidentally overheard on one of the wiretaps was a currently sitting Associate Justice of the Supreme Court of the United States who made plans to review a manuscript by one of the targets.” (*Id.*)

chell, and in May 1970, Nixon assigned Haldeman to monitor the reports.

Petitioners assert that "Dr. Halperin was selected for surveillance on the grounds that Director Hoover had identified Halperin at the April 25 meeting as having unfavorable information in his security file, that Dr. Kissinger had included Halperin's name on the list of key NSC personnel with access to leaked information, and Hoover had advised Kissinger on May 9 that a preliminary investigation showed Halperin to be a principal suspect regarding the leaks." (Pet. Br. 4 n.6.) However, the record indicates a different sequence of events leading to Halperin's selection.

Although petitioners had earlier decided to embark on a wiretap program, the event which triggered the first taps was a May 9, 1969 story by William Beecher in the *New York Times* describing the operational details of secret American B-52 bombing raids on Cambodia. (Pet. Br. 3.) At that time Halperin was working for Kissinger as Chief of the National Security Council Planning Group, having been recruited for this position by Kissinger. (II J.A. 195-196.) Prior to joining the NSC staff, Halperin had been a Deputy Assistant Secretary of Defense during the Johnson Administration.

Kissinger met with Halperin on May 9 and told him that he was suspected of being the source of the Beecher article. Halperin assured Kissinger that he was not and pointed out that he did not even have access to the information in the article. (I J.A. 214.)⁴ Kissinger stated that he ac-

⁴Halperin also lacked access to much of the information which appeared in the news stories prior to May 9 that had alarmed Nixon and his advisors and had been the purported reason for initiating the wiretap program. (I J.A. 267, 319-320.)

cepted Halperin's assurances but said that a number of high level figures in the Nixon Administration were suspicious of Halperin and considered him disloyal. (I J.A. 214-215.) Accordingly, Kissinger told Halperin that he would cut off Halperin's access to sensitive information for a time so that if any more information leaked, Halperin could not be blamed. (I J.A. 215.)

On May 9, Kissinger also called Hoover and requested "a major effort" to find the source of the Beecher story. (I J.A. 170.) Later in the day, according to Hoover's memorandum, Hoover told Kissinger that "our investigation led to nothing very definite except the possibility that [Beecher's] story was primarily on informed speculation as there had been made available publicly a lot of source material from which he could draw his conclusions." (I J.A. 171.) Although Hoover concluded that the information might have come from the NSC staff, he also said that there was "a strong possibility" that the leak came from offices at the Department of Defense where scores of employees had access to the information. (I J.A. 173.) Hoover also told Kissinger that there was only "speculation" tying Halperin to the Cambodian bombing story and other leaks. (*Id.*) Hoover's comments about Halperin did not mention any adverse security information or any propensity to leak. (I J.A. 174.)⁵

On the day of the Beecher story, Kissinger directed his military assistant, Col. Alexander Haig, to draw up a list of those who had access to information about the bomb-

⁵Except for this brief flurry of activity on May 9, 1969, before the taps began (I J.A. 170-175), there is no indication that the FBI ever conducted any further investigation of Halperin in addition to the wiretap. There were no interviews, no physical surveillances, no lie detector tests, no attempts to contact journalists or FBI informants and no reports of any conclusion as to likely leakers. (Pet. App. 72a.)

ing campaign. (Haig Dep. 143.) Since Halperin did not have access to the published information, Haig did not include Halperin on the list which he prepared for Kissinger. (Haig Dep. 142-143.) Kissinger, however, instructed Haig to give to the FBI the names of four individuals who were not on Haig's list, including Halperin. (II J.A. 212-214.) Significantly, Kissinger listed none of the members of his staff who had access to the bombing information. (*Id.*)

While there was no evidence suggesting that Halperin was a likely leaker, there is much evidence suggesting that he was selected for other purposes. Kissinger later stated that the three members of his staff whose names he gave to Haig were individuals whom others in the Administration had urged him not to hire. (I J.A. 330-331; II J.A. 198-199.) Halperin in particular had been the subject of strong letters to Nixon and Mitchell from Senator Barry Goldwater urging that Halperin and other hold-overs from the Johnson Administration not be retained. (I J.A. 167-169.) Furthermore, Haldeman and the Chairman of the Joint Chiefs of Staff had raised objections with Kissinger over hiring Halperin. (II J.A. 196-198.) It thus appears that Kissinger selected Halperin as a wiretap target not because he suspected him of leaking, but rather to bolster Kissinger's standing in the White House and to diffuse the criticism of his staff appointments.

On May 10, 1969, Haig, acting on Kissinger's instruction, visited William Sullivan — the Assistant Director of the FBI in charge of the Intelligence Division — and requested electronic surveillance of the four individuals identified by Kissinger. (Haig Dep. 135-36; I J.A. 175-176.) Haig also requested that no records of the surveillance be maintained and that if possible the Department of Justice not be informed. Haig further proposed that he would come to Sullivan's office to review the

results of the surveillance rather than receiving reports at his own office. (I J.A. 175-176.)

Sullivan forwarded Kissinger's request to Hoover, who submitted a memorandum seeking the Attorney General's approval for the four surveillances. (I J.A. 177.) Although Department of Justice regulations required that such applications include "a general description of the activities subject is engaged in and the type of information which it is anticipated will be obtained through the electronic coverage [and] the period of time for which approval is requested" (I J.A. 163), this memorandum provided only the following supporting information:

Halperin, aged 30, was detailed from the Department of Defense to the National Security Council as a senior staff member on January 21, 1969. He was the subject of an applicant-type investigation by the Bureau. While admittedly he has had contact with Soviet nationals the investigation did not disclose at that time any pertinent derogatory information.

(I. J.A. 177.) Notwithstanding the lack of any pertinent derogatory information about Halperin or any other stated reason to wiretap him, Mitchell signed the memorandum on May 12, 1969, thereby approving the surveillance.⁶

⁶Petitioners have never identified any information in Halperin's security file indicating a propensity to leak. The "unfavorable" information to which they refer (Pet. Br. 4 n.5) concerns two minor instances where Halperin erred in filling out security forms during his employment at the Department of Defense. (A detailed analysis of these incidents is set forth at I J.A. 268-277.) When Halperin transferred from the Defense Department to the NSC at the outset of the Nixon Administration, Kissinger reviewed these incidents and deter-

From May 13, 1969 to February 10, 1971 the wiretap was continuously in place on the Halperin home telephone.⁷ During this period Morton Halperin had little or no access to sensitive information because Kissinger never resumed Halperin's access after cutting it off on the same day he selected Halperin for surveillance. (I J.A. 214-216.) Halperin left the NSC staff four months later on September 19, 1969, although Kissinger attempted to persuade him to remain, even offering to resume Halperin's full access to sensitive information. (II J.A. 229.) At Kissinger's request, Halperin did agree to assume a consultant status with the NSC, which he maintained until the following May, but he had no access to any classified NSC information in that capacity. (I J.A. 216.)

Despite Halperin's limited and eventual total lack of access to sensitive information and the absence of any evidence that he was engaged in leaking, petitioners never reconsidered the propriety of the Halperin wiretap, even though Department of Justice regulations required that an authorization for a national security wiretap be renewed every 90 days. (II J.A. 134-135.) Indeed, petitioners rejected suggestions from experienced officials of the FBI that the tap be terminated. Two days after the tap was in-

mined that Halperin was suitable for employment and the accompanying high level clearances. (I J.A. 327-330.) Indeed, the FBI security report on Halperin to the NSC did not even mention these two incidents. (J.A. 298-299.) The inconsequential nature of Halperin's omissions is demonstrated by the fact that the Defense Department, the Central Intelligence Agency, and the Atomic Energy Commission subsequently approved him for numerous highly restricted top secret clearances. These clearances remained in effect until Halperin resigned from the National Security Council staff in September 1969. (I J.A. 287-293.)

⁷The logs show that there were interceptions beginning on May 9, 1969 when the FBI appears to have unilaterally initiated the surveillance. (Jones Dep. 6; Belter Dep. 61-62.)

stalled, Sullivan notified Hoover that no information related to leaks had been uncovered. (I J.A. 178.) On June 20, 1969, Haig, acting for Kissinger, accepted Sullivan's recommendation to discontinue the wiretaps of some suspected leakers, but not the one on Halperin even though "nothing of late relevant to leaks" had been discovered. (I J.A. 183.) On July 8, 1969, Sullivan reported to Hoover that "nothing has come to light of significance from the standpoint of the leak in question" and that he believed that Halperin knew his phone was tapped. Accordingly, Sullivan suggested to Haig that "some of this coverage be removed." (I J.A. 184.) In July 1970, the FBI agent in charge of the surveillance wrote to Sullivan that he had not "noticed much info of value in recent months" and recommended that the wiretap be discontinued. (I J.A. 206.) Finally on February 10, 1971, the wiretap was removed (I J.A. 211), although there is no indication that this was due to any action undertaken by petitioners.⁸

The FBI employees who monitored the phone listened to all conversations, tape recorded ones they thought to be significant, and prepared written logs of some conversations. (Belter Dep. 37-38, 92.) The log entries, which were forwarded to Sullivan's office, ranged from verbatim texts of conversations to simple notations of the times of calls and the identity of the conversants. (Belter Dep. 37-40, 63; Jones Dep. 25.) Of the many thousands of calls which were overheard, 638 calls were logged. (I J.A. 227.)

⁸According to Acting Director of the FBI, William D. Ruckelshaus, it was Hoover's practice to discontinue warrantless wiretaps shortly before congressional appearances so that he could report a minimum number of taps in operation if questioned. The Halperin wiretap was terminated just before Hoover's appearance before the House Appropriations Committee. (Report of the House Committee on the Judiciary, *supra* at 148-149.)

Twenty-seven percent (173) of these calls were between Mr. and Mrs. Halperin; forty-three percent (272) of the calls were between Mrs. Halperin — who had never had access to, or was alleged to be leaking, classified information — and third parties; only twenty-nine percent (186) of the logged calls were between Mr. Halperin and third parties. (*Id.*) The three Halperin children were each specifically identified once in the logs, and 13 other entries in the logs note calls involving unidentified children. (*Id.*) The remaining logged calls involved guests who used the Halperin home telephone.

At the outset of the surveillance, Haig, and on at least one occasion Kissinger, went to Sullivan's office to read the logs. (I J.A. 179-180; Sullivan Dep. 80.) Beginning at the end of May 1969, the FBI summarized the logged information in letters which were sent to both Nixon and Kissinger over Hoover's signature. (I J.A. 264; Sullivan Dep. 42-43; Haig Dep. 41-43.) Copies of at least three of these letters were also sent to Mitchell. (I J.A. 249, 264; II J.A. 162.) Nixon, Mitchell, Kissinger, and Haldeman were at least generally familiar with the contents of the letters because they either read them or were briefed on them, and all of them discussed the contents with at least a few other individuals. All of them were aware that no information was being obtained relating to leaks and that much personal and political information was being gathered and disseminated. (II J.A. 98-100, 162, 238-239, 300-301.)

For example, in December 1969 petitioners learned from the wiretap that Morton Halperin was assisting former Secretary of Defense Clark Clifford in writing an article for *Life Magazine* criticizing the Nixon Administration's Vietnam policy. (I J.A. 191-192.) This information was used by White House staff members "to springload

ourselves to a position from which we can effectively counter whatever tack Clifford takes." (I J.A. 193.) In May 1970, the FBI prepared a memorandum for Hoover summarizing the information which had been sent to Nixon and Kissinger since the announcement on April 30, 1970 of the invasion of Cambodia. (I J.A. 201-202.) The "highlights" from the Halperin tap included information that Halperin planned to resign his consultant's position with the NSC to protest the invasion, that Halperin believed the President would attack North Vietnam and Laos, that Halperin agreed to work with Senator Fulbright in opposing the war, and that Halperin and others were forming an organization to oppose the war. (*Id.*)

On May 12, 1970, Nixon and Hoover met to discuss the wiretap program. Nixon directed that thereafter the summary letters should be directed to Haldeman, who would screen them and pass pertinent information to Nixon and Kissinger. (I J.A. 203-205; II J.A. 293-296.) From this point until the termination of the tap in February 1971, the FBI sent Haldeman sixteen summary letters which contained substantial amounts of information pertaining to the political activities of Halperin and others. These letters reported on Halperin's contacts with Senators, including their private views on pending legislation to end the Vietnam war, the efforts of various citizens' groups to lobby against the war, development of a foreign policy position by Common Cause, and the activities of the Muskie presidential campaign in which Halperin became involved as a foreign policy advisor. A sampling of these summary letters is set out in Volume I of the Appendix at pages 252-256.

Following the termination of the wiretap, vigorous efforts were made to conceal it from authorities lawfully entitled to be informed of it. At Nixon's direction all records were

removed from the FBI and stored first with Assistant Attorney General Robert Mardian and then in John Ehrlichman's White House safe. (I J.A. 260-261, 264.) Following the indictment of Daniel Ellsberg in June 1971 for his participation in the publication of the Pentagon Papers, his counsel were repeatedly told in response to discovery requests that he had not been overheard on any FBI wiretap. In fact, Ellsberg had been overheard at least fifteen times on the Halperin wiretap and had been mentioned in one of the summary letters sent to Kissinger and Nixon. (Report of the House Committee on the Judiciary, *supra* at 154; letter dated September 3, 1969; I J.A. 259, 264.)

In February 1973, *Time Magazine* informed the White House that it had learned of the wiretapping program, but the White House denied the story. (Report of the House Committee on the Judiciary, *supra* at 154-155.) In March 1973, at the confirmation hearings of L. Patrick Gray to be Director of the FBI, Gray was asked whether the FBI had conducted the wiretaps described in the *Time* story, and he answered that the FBI did not have records reflecting the existence of such taps. (*Id.*) Nixon, who knew that the FBI files were incomplete because of his orders to hide the records in the White House, did not intervene to order Gray or any other official to advise the Committee of the facts. (II J.A. 111-115.)

The existence of the wiretap program first became known to respondents on May 10, 1973. The previous day, William D. Ruckelshaus, Acting Director of the FBI, filed a memorandum with the trial judge in the Ellsberg case, advising him that he had just learned that Ellsberg had been overheard on the Halperin wiretap while a guest of the Halperins. (I J.A. 262, Ruckelshaus Dep. 6.) The following day, the judge ordered the release of this

memorandum and shortly thereafter Ruckelshaus recovered the Halperin wiretap records from Ehrlichman's safe and returned them to the FBI. (I J.A. 262-263, 264.)

C. District Court Proceedings.

Respondents filed suit against petitioners Kissinger, Mitchell, Haldeman, and others in June 1973 alleging that the wiretap violated their rights under the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. Although then President Nixon had publicly announced on May 23, 1973 that he had authorized the entire wiretap program (I J.A. 212-213), he was not named as a defendant when the suit was filed. In July 1974, the House Judiciary Committee voted to impeach Nixon, and one of the articles of impeachment included the wiretap program.⁹ On August 9, 1974, Nixon resigned from office, and on September 8, 1974, President Ford pardoned him for all offenses he may have committed against the United States while in office. Moreover, by that time several depositions in this case had demonstrated that Nixon was personally involved in the Halperin wiretap. See *Halperin v. Kissinger*, 401 F. Supp. 272 (D.D.C. 1975). It was only after all these events that respondents amended their complaint on September 30, 1974 to include the former President as a defendant.

After the parties had completed discovery, they cross moved for partial summary judgment on the issue of liability. The District Court accepted petitioners' contention that the wiretap was installed to investigate leaks, despite factual disputes on this issue. (Pet. App. 68a.) The Court also found that "defendants' determination that Title III was inapplicable to the Halperin wiretap was

⁹Debate on Articles of Impeachment, House Committee on the Judiciary, 93d Cong. 2d Sess. 369-447 (1974).

reasonable during the period of the surveillance" and that there was "no genuine issue of fact in the record controverting this good faith belief on defendants' part." (Pet. App. 66a.) This ruling was based on the Court's view that the scope of the national security proviso to Title III, 18 U.S.C. § 2511(3), was unsettled at the time of the Halperin surveillance, prior to the rulings in *United States v. United States District Court*, 407 U.S. 297 (1972) (holding warrants required for internal security surveillances) and *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir.) (*en banc*), cert. denied, 425 U.S. 944 (1976) (holding warrants required and Title III applicable in all cases where target of surveillance is not the agent or collaborator of a foreign power). (Pet. App. 63a-66a.)

Turning to respondents' Fourth Amendment claims, the District Court assumed that the warrant requirement was inapplicable (Pet. App. 67a, 70a) and examined whether the surveillance satisfied the reasonableness requirement of the Amendment. Without passing on the propriety of selecting Halperin, the Court characterized the wiretap as "a dragnet which lacked temporal and spatial limitation" and which represented "the antithesis of the 'particular, precise, and discriminate' procedures required by the Supreme Court in numerous Fourth Amendment cases." (Pet. App. 69a.) Accordingly, the Court ruled that the "surveillance constituted an invasion of plaintiffs' privacy and freedom of expression" and was "per se unreasonable under the Fourth Amendment and unjustified by any possible exception thereto." (Pet. App. 69a-70a.)

In determining the liability and responsibility of the individual petitioners, the District Court carefully distinguished between their different roles in the wiretap:

— Nixon was found liable for having authorized the overall program, for overseeing it, and for failing to take any affirmative action to terminate the Halperin

surveillance or reduce its scope when he was aware that no information relating to leaks was being obtained and that much non-pertinent information was being gathered. (Pet. App. 70a-73a.)

— Mitchell was found liable for failing to carry out his review and renewal obligations under Justice Department regulations, both when the tap was initiated and throughout its twenty-one month life. (*Id.*)

— Haldeman was found liable for failing to recommend termination of the tap when he knew that the summary letters contained no information relating to leaks but much non-pertinent information, and for having disseminated the information for purposes unrelated to the tap's original justification. (Pet. App. 72a-73a.)

The District Court ruled that these petitioners cannot claim "absolute immunity for their excessive actions." (Pet. App. 73a.) The Court also ruled that petitioners Nixon, Mitchell, and Haldeman were not entitled to any good faith defense for the overly broad surveillance. (Pet. App. 73a.) This ruling was based on two different findings. First, as an objective matter, "their activities relating to the wiretap continuance [were] unreasonable and in violation of established Fourth Amendment rights." (Pet. App. 73a.) Second, the Court found that under all the circumstances — "a twenty-one month wiretap continuance without fruits or evidence of wrong-doing, a failure to renew or evaluate the material obtained, a lack of records and procedural compliance, a seemingly political motive for the later surveillance and dissemination of reports, and an apparent effort to conceal the wiretap documents" — petitioners had failed to establish a subjective good faith defense. (Pet. App. 74a.)

The District Court granted summary judgment in Kissinger's favor because of his "inactive role and [his]

lack of oversight authority." (Pet. App. 75a.) The Court found that Kissinger had "provided Mr. Halperin's name to the FBI since he appeared to meet the criteria established for those suspected of leaking classified information." (*Id.*) Although Kissinger received reports from the surveillance, the Court found that he had regarded Nixon, Mitchell, and Hoover "as responsible for determining when to terminate the wiretap." (*Id.*)

In a subsequent opinion the District Court refused to award compensatory damages because respondents had not alleged any physical or economic injury. (Pet. App. 55a-56a.) The Court also ruled that punitive damages were inappropriate, even though petitioners had failed to establish a good faith defense, because "their conduct cannot fairly be characterized as wanton, reckless or malicious disregard of plaintiffs' rights. . ." (Pet. App. 56a.) Accordingly, the Court ruled that respondents were entitled to only nominal damages of one dollar each. (*Id.*) At that time, the Court also permanently enjoined defendants — including the Director of the FBI who had been sued in his official capacity for purposes of equitable relief — from making any use or disclosure of respondents' intercepted communications and ordered them to place exonerating information in Halperin's security file, including Kissinger's sworn statement that he knew of no wiretap information impugning either Halperin's loyalty or his discretion. (Pet. App. 59a.)

D. The Court of Appeals Decision.

On cross appeals, the Court of Appeals ruled for respondents in all respects. Relying on this Court's intervening decision in *Butz v. Economou*, 438 U.S. 478 (1978), the Court of Appeals rejected the claim of Mitchell, Haldeman, and Kissinger that they are entitled to

absolute immunity. (Pet. App. 36a-37a.) It also reversed the summary judgment in favor of Kissinger, finding material facts to be in dispute regarding his responsibility for the wiretap. (Pet. App. 49a-50a.)¹⁰

With respect to Nixon's claim that he is entitled to greater protection because of his former office, the Court held that a former President is not entitled to absolute immunity from damage liability arising from an unconstitutional wiretap and rejected his contention that presidential absolute immunity is constitutionally mandated. (Pet. App. 42a-45a.) Not only did the Court find that the Constitution is silent with respect to any such immunity (Pet. App. 42a), but it also concluded that article 1, section 3, clause 7, which provides that an impeached President may be criminally tried, implies that "incumbency does not relieve the President of the routine obligations that confine all citizens." (Pet. App. 43a.) The Court also rejected the argument that the doctrine of separation of powers requires absolute immunity since such a holding would abdicate the judiciary's role in protecting constitutional rights. (Pet. App. 44a-45a.)

Turning to the "prudential grounds" which petitioners so vigorously press in this Court, the Court of Appeals weighed the advantages and disadvantages of presidential liability for constitutional violations and rejected the assertion that "the repercussions of finding liability would be drastically adverse." (Pet. App. 42a.) Noting that "the denial of absolute immunity is intended to affect Executive behavior that threatens to violate constitutional rights," the Court concluded that "if we are serious about providing a remedy for constitutional violations, there can be no rational basis, as the *Economou* Court emphasized, for

¹⁰Kissinger does not challenge that ruling in this Court. (Pet. Br. 10 n.11.)

holding inferior officials liable for constitutional violations while immunizing those higher up." (Pet. App. 45a-46a.) Relying on the principle that "[n]o man in this country is so high that he is above the law," the Court applied the logic of *Economou* to Presidents. (Pet. App. 49a.)

At the same time, the Court reasoned that "suits that may successfully be pursued against a President will be quite rare." (Pet. App. 45a.) This is so because the doctrine of qualified immunity, as articulated by this Court in *Scheuer v. Rhodes*, 416 U.S. 232, 247-249 (1974), provides a "sliding scale" of protection according to the responsibilities of the official, which necessarily gives the maximum protection to a President. (Pet. App. 46a-47a.) Consequently, he will be inhibited in the discharge of his duties only from the clearest violations of the constitutional rights of citizens, and in most cases "plaintiffs would have substantial difficulty in defeating a President's claim of immunity." (Pet. App. 47a.)¹¹

With respect to respondents' statutory claim, the Court held that Title III would apply to "any period during which the wiretap did not involve the primary purpose of protecting national security information against foreign intelligence activities" and remanded for a determination

¹¹Judge Gesell filed a concurring opinion urging that "a more exacting standard be placed on the showing a plaintiff must make before proceeding to trial in the face of a properly presented qualified immunity claim." (Pet. App. 53a.) In his view, "the plaintiff must establish after the completion of discovery and before trial commences, not merely the existence of a genuine dispute as to some material fact but also, by the preponderance of the evidence or through clear and convincing evidence, that the official failed to act with subjective or objective good faith." (Pet. App. 52a-53a.) Judge Gesell did not, however, suggest that respondents in this case failed to meet this higher standard.

of the purpose of the wiretap. (Pet. App. 28a.)¹² In so ruling, the Court indicated that it had substantial doubts about whether the wiretap was initiated and conducted for the alleged purpose of identifying leakers. In particular, it noted its doubt about the period after May 1970 when Halperin had resigned as an NSC consultant, had lacked access to sensitive information for the preceding year, and continuous surveillance had revealed no evidence that he was a leaker. (Pet. App. 26a.) It also noted that after Halperin left the NSC staff in September 1969, the national security rationale "would seem almost equally attenuated." (Pet. App. 27a.) Finally, the Court specifically directed the District Court to examine respondents' contention that Halperin was originally selected for surveillance to bolster the political credibility of Kissinger's staff appointments. (Pet. App. 27a-28a.)

With respect to the constitutional claims regarding the institution of the wiretap, the Court of Appeals rejected the District Court's view and held that a warrant was required at the initiation of the surveillance (Pet. App. 29a-31a) and remanded for a determination of whether petitioners can avoid liability based on a good faith defense due to the uncertainty of the law in 1969. (Pet. App. 31a, 41a.) In addition, the Court affirmed the District Court's rulings that the continuation of the surveillance was constitutionally unreasonable (Pet. App. 29a) and that petitioners are not entitled to qualified immunity for this aspect of respondents' claims. (Pet. 40a-41a.) However, the Court remanded for a determination of when the wiretap became unreasonable. (Pet. App. 29a.) The Court stressed that in "a complex case like this one, the District Court must undertake a particularized inquiry into the immunity available for each alleged type or

¹²Petitioners have not appealed from this decision or asserted absolute immunity from Title III liability. (Pet. Br. 10 n.16.)

period of constitutional or statutory violation in order to safeguard both the individual rights asserted by the Halperins and the freedom of Executive officials to act.” (Pet. App. 41a.)

With regard to the appropriate level of damages for Fourth Amendment violations, the Court directed that further proceedings be held, ruling that “even if a constitutional violation inflicts only intangible injury, compensation is still appropriate” (Pet. App. 33a.), a ruling that petitioners have not challenged in this Court. (Pet. Br. 10 n.16.) However, in light of its reinstatement of the statutory claims, the Court noted that respondents could not recover simultaneously under both Title III and the Constitution. (Pet. App. 31a.)

E. Proceedings In This Court.

After petitioners filed their petition for a writ of certiorari, respondents moved in the District Court to disqualify government counsel from continuing joint representation of petitioners on two grounds. First, they pointed out that because of petitioners’ differing roles, responsibilities, and defenses, conflicts of interest existed among them which should prevent joint representation and that such joint representation also made it impossible for respondents to attempt to settle with one or more of the four petitioners so long as they all were represented by the same attorney. Second, respondents argued that the Department of Justice could not adequately represent these individuals because the institutional interests of the government were not congruent with those of the petitioners. In both instances, the petition for certiorari had brought these conflicts into sharp focus. On the same day respondents filed their motion in the District Court, they also filed a motion in this Court for leave to defer filing

their brief in opposition until after the District Court ruled on the disqualification motion. On March 17, 1980, this Court denied respondents' motion to defer. On March 28, 1980, the District Court denied the disqualification motion without prejudice to renewal at a later date. The petition for certiorari was granted on May 19, 1980.

SUMMARY OF THE ARGUMENT

I.

In *Butz v. Economou*, 438 U.S. 478 (1978), the Court held that federal executive officials have a qualified rather than absolute immunity from damages liability in suits alleging violations of constitutional rights. This decision was based on the conviction that no man in this country is above the law and that the higher the official the greater the risk of abuse of power and therefore the greater the need for damage remedies to deter unconstitutional conduct and to compensate its victims. Since petitioner Nixon was directly responsible for a massive invasion of respondents' Fourth Amendment rights, the rule established in *Economou* applies to him. Petitioners urge, however, that the President is entitled to absolute immunity because the Framers of the Constitution intended to immunize the President from civil suit and because the special functions of the presidency require such immunity. Both contentions are without merit.

The Framers clearly intended that the President was to be subject to the law rather than above it. In providing that he could be impeached for crimes against the government, they also intended that injured citizens would continue to have recourse against even an impeached President under the common law.

Petitioners' policy argument is based in large part on substantial overstatement of the implications of the decisions below. This case involves a continuous twenty-one month violation of respondents' Fourth Amendment rights through a surreptitious wiretap, and therefore affirmance will not involve the courts in routine oversight of the vast range of the President's discretionary responsibilities. There may well be other torts for which absolute immunity is appropriate and other presidential functions toward which the courts should show deference. This case, however, only requires the courts to exercise their well-established role in protecting the constitutional rights of citizens against executive action which exceeds the limitations imposed by the Constitution. Indeed, petitioners concede that in some circumstances the President is subject to suits for injunctive relief, and it is difficult to understand why they resist judicial review of his conduct in the context of damage actions.

Petitioners also contend that damage actions against a President are unnecessary because he is sufficiently constrained by the system of checks and balances, including the possibility of impeachment. It is obvious that those constraints had no prophylactic effect on the conduct which led to this case, and damage actions are therefore a useful addition to the arsenal of checks on official misconduct. Moreover, the institutional mechanisms on which petitioners would exclusively rely do not offer any compensation for citizens whose rights are violated, and this Court has held damage remedies should be available in such situations. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Petitioners further contend that qualified immunity is insufficient to protect the President from intolerable distractions and burdens imposed by pending litigation. This argument overlooks the fact that qualified immunity provides a sliding scale of protection which varies accord-

ding to an official's position. Accordingly, it necessarily affords the greatest degree of protection to a President because of the scope of his discretion, the responsibilities of his office, and the exigent circumstances in which he often must act. Thus, a President will become personally involved in litigation only when it is clearly shown that he directly participated in violations of constitutional rights, and suits alleging anything less will meet an early dismissal. If a sitting President should be sufficiently implicated in a damage suit that his active participation is required — and none has — district courts have broad discretion to minimize the burden on him and could even stay proceedings until he left office.

II.

Petitioners Kissinger, Mitchell, and Haldeman recognize that it is settled under *Economou v. Butz* that they are entitled to only qualified immunity, but they argue that if petitioner Nixon is afforded absolute immunity, they should receive the same measure of protection on a derivative theory. The premise of this argument is the assumption that these three petitioners were mere agents executing petitioner Nixon's orders. To the contrary, Kissinger, Mitchell, and Haldeman all had distinct roles in the Halperin wiretap involving broad discretion, and it is for these individual roles that they are sued, rather than for any advice they may have furnished to Nixon. Kissinger selected wiretap targets, decided when to terminate the surveillances, and was responsible for choosing Halperin. Mitchell, who supervised the wiretaps, was required to approve specific taps and periodically review them under Department of Justice regulations, and his failure to do either resulted in the overly broad and excessively lengthy surveillance of the Halperin family. Haldeman monitored the information gleaned from the wiretap and used it for improper political purposes.

Furthermore, there is no legal basis for petitioners' derivative immunity argument. This Court has repeatedly held that Congressional employees are not entitled to derivative immunity under the Speech or Debate Clause when they engage in unlawful conduct even though a member of Congress may be immune for authorizing the conduct. *Powell v. McCormack*, 395 U.S. 486 (1969); *Dombrowski v. Eastland*, 387 U.S. 82 (1967); *Kilbourn v. Thompson*, 103 U.S. 168 (1881). Similarly, even if petitioner Nixon is absolutely immune for authorizing and overseeing the wiretap program, petitioners Kissinger, Mitchell, and Haldeman should not have a derivative absolute immunity for their actions in conducting the Halperin wiretap.

III.

Petitioners contend that they are entitled to qualified immunity as a matter of law because the requirements of the Fourth Amendment with respect to national security wiretaps were unsettled at the time of the Halperin wiretap. For the same reason, they also contend that the decisions below unfairly imposed retroactive liability.

The principal flaw in these arguments is that petitioners have not established on their motion for summary judgment that the Halperin wiretap was conducted for bona fide national security purposes and there is substantial evidence in the record that it was conducted for improper political purposes. In 1967, this Court held that the Fourth Amendment applies to electronic surveillance of telephones calls, although the Court reserved the question of whether the warrant requirement applies in national security cases. *Katz v. United States*, 389 U.S. 347. Therefore if the 1969-1971 Halperin wiretap was not conducted for national security purposes, it plainly violated the Fourth Amendment. Petitioners cannot escape liability

by labeling a political intelligence operation a "national security" operation, and the undisputed factual predicate which is necessary to establish their right to summary judgment on their qualified immunity and retroactivity defenses is missing.

A second flaw in petitioners' argument is that since *Katz* only reserved the question of whether warrants are required in national security wiretaps, it was settled in 1969 that the reasonableness requirement of the Fourth Amendment applied with full force to the Halperin wiretap. The elements of Fourth Amendment reasonableness in the electronic surveillance area had been spelled out prior to 1969 in cases such as *Berger v. New York*, 388 U.S. 41 (1967). Since the Halperin wiretap was conducted for twenty-one months without producing any evidence of leaking and without any attempt to minimize the interception, logging, and dissemination of non-pertinent conversations, it violated law that was clearly established before the tap was installed. Therefore, the legal predicate for petitioners' qualified immunity and retroactivity arguments is also missing.

Petitioners are not entitled to summary judgment on their qualified immunity defense for the additional reason that they have failed to establish the absence of a factual dispute on whether they initiated and conducted the Halperin wiretap in good faith without an improper motive, a deliberate intention to injure respondents, or a reckless disregard for respondents' interests. It is well established that the affirmative defense of qualified immunity requires both a showing that the defendant did not violate any clearly established right of which he knew or should have known and that he acted in subjective good faith. E.g., *Wood v. Strickland*, 420 U.S. 308 (1975). In this case, the evidence of petitioners' political rather than national security purposes in initiating and conducting the Halperin wiretap and their indifference to the prolonged

violation of respondents' privacy is sufficiently strong to preclude a finding of good faith on petitioners' motion for summary judgment.

ARGUMENT

I. PETITIONER NIXON IS NOT ENTITLED TO ABSOLUTE IMMUNITY FROM CIVIL LIABILITY FOR DELIBERATE VIOLATIONS OF RESPONDENTS' FOURTH AMENDMENT RIGHTS.

The question presented here is whether a former President enjoys absolute immunity from civil liability for actions he took in office which violated Fourth Amendment rights. The case does not involve violations of other rights, and affirmance of the decision below certainly will not authorize "routine oversight" by the judiciary of all presidential actions. (Pet. Br. 17-18, 33, 34.) In *Butz v. Economou*, 438 U.S. 478 (1978), this Court ruled that the rights of citizens and the interests of efficient government will be best accommodated if federal executive officers are afforded qualified rather than absolute immunity in cases alleging knowing violations of constitutional rights. *Economou* therefore provides the analytic framework for answering the question presented here, and the logic of *Economou* requires that its holding be applied to the chief officer of the executive branch. Petitioners, however, seek to relitigate the Court's determinations in *Economou*, since neither history nor public policy justify a different immunity for the President than is available to all other executive officials.¹³

¹³The immunity that petitioner Nixon seeks is not in fact absolute because he has not sought review of his liability for damages under Title III, 18 U.S.C. § 2520. (Pet. Br. 10 n.16.) Therefore, even if he prevails on the question presented of absolute immunity from

A. The Analytic Framework.

In ruling on the degree of immunity which is appropriate for any given government official, this Court has considered a number of factors which should guide its decision with respect to the immunity of Presidents. First, it has determined that while officials may be absolutely immune from liability for common law torts which they inflict in the course of the duties, violations of constitutional rights are treated differently. Second, it has determined that damage actions are an important means of securing constitutional rights because they compensate the victim for his loss and deter official misconduct. Third, the Court has generally afforded officials a qualified rather than absolute immunity for constitutional torts, although the scope of this qualified immunity expands in proportion to the broader duties and discretion of high-ranking officials. Fourth, where the Court has granted absolute immunity, it has done so only with respect to participants in judicial or quasi-judicial proceedings where misconduct is deterred by the open adversary system and abuses are correctable through appellate procedures. Finally, the Court has based its immunity decisions on a careful analysis of the official's function which gave rise to the injury and has refused to extend absolute immunity categorically on the basis of titles or positions. Each of these factors is examined below in greater detail.

In *Economou*, the Court concluded that absolute immunity for federal officers who knowingly and deliberately violate constitutional rights "is contrary to the course of decision in this Court from the very early days of the

respondents' constitutional claims, he still will face trial on the statutory claims, which depend on the sharply disputed factual issue of whether at all times over the twenty-one months of the wiretap, its "primary purpose [was to protect] national security information against foreign intelligence activities." (Pet. App. 28a.)