

# PENDENT APPELLATE BOOTSTRAPPING

Stephen I. Vladeck

NE OF THE CENTRAL PRINCIPLES of federal appellate practice and procedure is the final judgment rule – the command originating in the Judiciary Act of 1789 (and codified today at 28 U.S.C. § 1291) that generally precludes parties from appealing adverse trial court decisions until after a "final decision[]" has been rendered.<sup>1</sup> As the Supreme Court has consistently reiterated, the final judgment rule does not just exist to protect litigation efficiency and the case-management authority of trial judges, but also reflects "the sensible policy of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment."<sup>2</sup>

Notwithstanding the final judgment rule, there are still a number

Stephen Vladeck is a Professor of Law and the Associate Dean for Scholarship at American University Washington College of Law. The views expressed here are his alone – a fact worth noting because he co-authored amicus briefs in support of the respondent in Mohawk Industries, Inc. v. Carpenter, 558 U.S. 100 (2009), and in support of the plaintiffs-appellees in Al Shimari v. CACI International Inc., 679 F.3d 205 (4th Cir. 2012) (en banc).

<sup>1</sup> See Cunningham v. Hamilton County, 527 U.S. 198, 203 (1999); see also Midland Asphalt Corp. v. United States, 489 U.S. 794, 798 (1989). See generally Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 548-51 (1932) (recounting the history of the final judgment rule).

<sup>2</sup> Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981) (alteration in original; internal quotation marks omitted).

of bases pursuant to which circuit courts may exercise jurisdiction over interlocutory district court orders. For example, Congress has codified a series of exceptions to the final judgment rule, and, more recently, has invested the Supreme Court with the power to identify additional exceptions through rulemaking.<sup>3</sup> But perhaps the most important and controversial category of such orders are those that fall within the "collateral order doctrine."<sup>4</sup> More a "practical construction" of § 1291 than an exception thereto, the doctrine identifies classes of additional trial court rulings that, though not "final" in the ordinary sense of the term, *ought* to be subject to immediate appeal despite the absence of any express statutory provision so providing, *i.e.*,

a "small class" of rulings, not concluding the litigation, but conclusively resolving "claims of right separable from, and collateral to, rights asserted in the action." The claims are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."<sup>5</sup>

Because of its controversial origins, amorphous grounding, and ambiguous scope, the Supreme Court has repeatedly stressed the doctrine's narrow compass – and has "not mentioned applying [it] ... without emphasizing its modest scope."<sup>6</sup> As Justice Sotomayor explained in 2009, this understanding "reflects a healthy respect for

<sup>&</sup>lt;sup>3</sup> See, e.g., 28 U.S.C. §§ 1292(a)-(b), 1651; see also, e.g., 9 U.S.C. § 16(a)(1)(A). See generally 28 U.S.C. § 1292(e) ("The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for . . . .").

<sup>&</sup>lt;sup>4</sup> See Cohen v. Ben. Indus. Loan Corp., 337 U.S. 541, 546 (1949).

<sup>&</sup>lt;sup>5</sup> Will v. Hallock, 546 U.S. 345, 349 (2006) (citations omitted); *see also* Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994). Justice Scalia has suggested that the doctrine is not a "construction" of § 1291, but rather something that the Justices "invented." *See* Sell v. United States, 539 U.S. 166, 189 & n.4 (2003) (Scalia, J., dissenting).

<sup>&</sup>lt;sup>6</sup> Will, 546 U.S. at 350; see also id. ("And we have meant what we have said; although the Court has been asked many times to expand the 'small class' of collaterally appealable orders, we have instead kept it narrow and selective in its membership." (citation omitted)); Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 609-12 (2009) (Thomas, J., concurring in part and concurring in the judgment).

the virtues of the final-judgment rule."7 That modesty is complicated by the fact that "[a]llowing appeals of right from non-final orders that turn on the facts of a particular case thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule – that of maintaining the appropriate relationship between the respective courts, ... a goal very much worth preserving."<sup>8</sup> Thus, "the issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a 'particular injustice' averted, by a prompt appellate court decision."9 As a result, Supreme Court decisions identifying new categories of such collateral orders are few and far between, all the more so since Congress in 1992 expressly empowered the Justices to "prescribe rules . . . to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for."10 As the Court unanimously concluded four years ago, in light of such statutory direction, "Any further avenue for immediate appeal of such rulings should be furnished, if at all, through rulemaking, with the opportunity for full airing it provides."<sup>11</sup>

Notwithstanding the strong policy judgment enmeshed within these statutes and the consistent rhetoric of the opinions quoted above, this essay aims to demonstrate that the Court has in fact ef-

<sup>&</sup>lt;sup>7</sup> Mohawk, 130 S. Ct. at 605.

<sup>&</sup>lt;sup>8</sup> Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978); see also Carroll v. United States, 354 U.S. 394, 405 (1957) ("Appeal rights cannot depend on the facts of a particular case.").

<sup>&</sup>lt;sup>9</sup> Risjord, 449 U.S. at 374 (quoting Van Cauwenberghe v. Biard, 486 U.S. 517, 529 (1988)).

<sup>&</sup>lt;sup>10</sup> 28 U.S.C. § 1292(e) (emphasis added). For the only recent example to the contrary, see *Osborn* v. *Haley*, 549 U.S. 225 (2007) (holding that a district court's denial of Westfall Act certification *is* an immediately appealable collateral order). For both procedural and substantive reasons, such post-1992 expansions of the "collateral order doctrine" cannot be defended as an exercise of the Court's delegated rulemaking authority – even *nunc pro tunc. See* Swint v. Chambers County Comm'n, 514 U.S. 35, 48 (1995). *See generally Mohawk*, 130 S. Ct. at 609-12 (Thomas, J., concurring in part and concurring in the judgment).

<sup>&</sup>lt;sup>11</sup> Mohawk, 130 S. Ct. at 609.

fected a dramatic (if largely unnoticed) expansion of the collateral order doctrine in recent years – one that, by its nature, applies specifically to private suits seeking damages against government officers in their personal capacity. Starting from the now-settled holding that a government officer's official immunity *is* an immediately appealable collateral order (at least as to the relevant legal questions),<sup>12</sup> the Court has used the obscure and obtuse doctrine of "pendent appellate jurisdiction" to *sub silentio* shoehorn into interlocutory appellate review of a trial court's contested denial of official immunity (1) whether the plaintiff's complaint satisfies the applicable pleading standards; (2) the elements of the plaintiff's cause of action; and (3) the very *existence* of such a cause of action.<sup>13</sup> More to the point, these expansions have come with exceptionally little analysis, with two of these three jurisdictional holdings buried in footnotes.

The practical effect of these beclouded expansions is only now becoming visible. Thus, in two recent high-profile *Bivens* cases, both the D.C. and Seventh Circuits (the latter sitting en banc) reversed a trial court's recognition of a *Bivens* claim on interlocutory appeal of the denial of qualified immunity, even though neither court of appeals disturbed the district court's underlying determination of nonimmunity.<sup>14</sup> And whatever might be said about the continuing viability of *Bivens* claims,<sup>15</sup> lower courts have begun to piggyback *other* legal questions going to the merits onto interlocutory immunity appeals, as well.<sup>16</sup> Taking these cases to their logical conclusion, it is difficult to see why *any* officer defendants sued in their personal capacity should not now be able to immediately appeal adverse determinations of *any* legal basis for defeating their liability simply by ap-

<sup>&</sup>lt;sup>12</sup> See, e.g., Mitchell v. Forsyth, 472 U.S. 511, 524-30 (1985).

<sup>&</sup>lt;sup>13</sup> See Ashcroft v. Iqbal, 556 U.S. 662, 672-75 (2009) (pleading); Wilkie v. Robbins, 551 U.S. 537, 549 n.4 (2007) (existence of cause of action); Hartman v. Moore, 547 U.S. 250, 257 n.5 (2006) (elements of cause of action).

<sup>&</sup>lt;sup>14</sup> See Vance v. Rumsfeld, 701 F.3d 193, 197-98 (7th Cir. 2012) (en banc); Doe v. Rumsfeld, 683 F.3d 390, 393 (D.C. Cir. 2012).

<sup>&</sup>lt;sup>15</sup> See, e.g., Carlos M. Vázquez & Stephen I. Vladeck, State Law, the Westfall Act, and the Nature of the Bivens Question, 161 U. PA. L. REV. 509 (2013).

<sup>&</sup>lt;sup>16</sup> See, e.g., Levin v. Madigan, 692 F.3d 607, 610-11 (7th Cir. 2012).

pealing a denial of official immunity prior to trial and then invoking pendent appellate jurisdiction as the source of the appellate court's authority to reach these otherwise unappealable interlocutory rulings.

In addition to flying in the face of longstanding precedent, the more troubling analytical implication of this trend is to both formally and functionally vitiate the longstanding distinction between litigation immunities and defenses to liability. To the extent that officer-defendants are now able to press legal defenses on interlocutory appeal of a denial of a motion to dismiss, such defenses will necessarily become functional immunities from suit in any case in which they are validly invoked – and will make it that much harder (and more expensive) for plaintiffs to recover even in cases in which they are not.

## I. DENIALS OF QUALIFIED IMMUNITY AS A COLLATERAL ORDER

In its 1982 decision in *Nixon v. Fitzgerald*, the Supreme Court formally held that a district court's denial of absolute immunity is an immediately appealable "collateral order," at least where the appeal raises a "serious and unsettled question" of law.<sup>17</sup> Three years later, in *Mitchell v. Forsyth*, the Court expanded that reasoning to encompass the objective standard for "qualified" immunity the Court had set forth in *Harlow v. Fitzgerald*:<sup>18</sup>

*Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.<sup>19</sup>

Moreover, as Justice White explained, including qualified immunity denials within the scope of the collateral order doctrine was not only justified by the *purpose* of such immunity, but also its na-

<sup>&</sup>lt;sup>17</sup> 457 U.S. 731 (1982).

<sup>&</sup>lt;sup>18</sup> 457 U.S. 800 (1982).

<sup>&</sup>lt;sup>19</sup> 472 U.S. 511, 526 (1985).

ture: "An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim."<sup>20</sup> Instead, the only questions such an appeal present is whether the defendant broke the law, and whether that law was clearly established at the time of the alleged transgression. Thus, whether or not denials of qualified immunity fit comfortably within the *Cohen* doctrine,<sup>21</sup> its inclusion – and the result in *Mitchell* – was based entirely on this understanding.

Nowhere is this point better underscored than in the Supreme Court's subsequent decision in *Johnson v. Jones*. Writing for a unanimous Court, Justice Breyer stressed that a trial court's ruling in a qualified immunity case that "determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial" was not itself immediately appealable under *Mitchell*, even though its resolution might bear on the defendant's entitlement to qualified immunity.<sup>22</sup> Instead, "considerations of delay, comparative expertise of trial and appellate courts, and wise use of appellate resources argue in favor of limiting interlocutory appeals of 'qualified immunity' matters to cases presenting more abstract issues of law."<sup>23</sup> Thus, although *Mitchell* dramatically expanded the scope of the collateral order doctrine,<sup>24</sup> the Court was loathe to expand it further – at least in qualified immunity cases.

# II. PENDENT APPELLATE JURISDICTION IN COLLATERAL ORDER APPEALS

Johnson v. Jones established that most other interlocutory trialcourt decisions in officer suits cannot benefit from the same logic

<sup>&</sup>lt;sup>20</sup> Id. at 528.

<sup>&</sup>lt;sup>21</sup> See id. at 543-56 (Brennan, J., dissenting) (arguing that denials of qualified immunity don't satisfy at least two of the three *Cohen* factors).

<sup>&</sup>lt;sup>22</sup> 515 U.S. 304, 320 (1995).

<sup>&</sup>lt;sup>23</sup> Id. at 317.

<sup>&</sup>lt;sup>24</sup> See Mitchell, 472 U.S. at 555-56 (Brennan, J., dissenting) (contrasting qualified immunity appeals with other classes of collateral orders, each of which has a "selflimiting quality").

as that deployed in *Mitchell* – and so are not directly appealable under the collateral order doctrine.<sup>25</sup> But even as the Court has reiterated this understanding, it has opened a critical backdoor to appellate review via the doctrine of "pendent appellate jurisdiction," *i.e.*, the power of appellate courts to resolve those questions that are "inextricably intertwined" with the issue over which their appellate jurisdiction directly extends.<sup>26</sup> Although pendent appellate jurisdiction has thrived in the circuit courts, the Supreme Court has only directly confronted it once - in Swint v. Chambers County Commission, in which Justice Ginsburg's opinion for a unanimous Court reserved the very existence of such jurisdiction,<sup>27</sup> and openly objected in that case to the possibility "that a rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay Cohen-type collateral orders into multi-issue interlocutory appeal tickets."28 Given this skepticism, it is difficult to understand why the Justices have more recently embraced such authority, all the more so in light of the paucity of analysis that the Court has offered in its three holdings to this effect.

In *Hartman v. Moore*, for example, the D.C. Circuit held, on appeal of the denial of qualified immunity, that a plaintiff bringing a *Bivens* claim for malicious and retaliatory prosecution did not need to allege that the underlying prosecution was brought without probable cause. After resolving that question, the Court of Appeals proceeded to hold that this proposition was not only true, but was

<sup>&</sup>lt;sup>25</sup> See, e.g., Ortiz v. Jordan, 131 S. Ct. 884, 891-92 (2011).

<sup>&</sup>lt;sup>26</sup> See Joan Steinman, The Scope of Appellate Jurisdiction: Pendent Appellate Jurisdiction Before and After Swint, 49 HASTINGS L.J. 1337 (1998); Riyaz A. Kanji, Note, The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context, 100 YALE L.J. 511 (1990).

<sup>&</sup>lt;sup>27</sup> See Swint v. Chambers County Comm'n, 514 U.S. 35, 50-51 (1995) ("We need not definitively or preemptively settle here whether or when it may be proper for a court of appeals, with jurisdiction over one ruling, to review, conjunctively, related rulings that are not themselves independently appealable."). At issue in *Swint* was pendent *party* appellate jurisdiction (that is, the power of a circuit court to exercise jurisdiction over claims of a different defendant than the one pursuing the interlocutory appeal), which the Court unanimously repudiated.

<sup>&</sup>lt;sup>28</sup> Id. at 49-50.

clearly established at the relevant time, thereby supporting the district court's denial of qualified immunity.<sup>29</sup> Although the Supreme Court reversed the D.C. Circuit on the merits (holding that a lack of probable cause *is* a necessary element of such claims), it sustained the court of appeals' jurisdiction. As Justice Souter explained in a cryptic footnote, "we are addressing a requirement of causation, which Moore must plead and prove in order to win, and our holding does not go beyond a definition of an element of the tort, directly implicated by the defense of qualified immunity and properly before us on interlocutory appeal."<sup>30</sup>

The footnote, the text of which ends there, nowhere explained that this was an exercise of "pendent appellate jurisdiction."<sup>31</sup> Nor did it explain why, if the D.C. Circuit *did* validly exercise such authority, the relevant standard for its jurisdiction was whether the issue was "directly implicated" by qualified immunity, in contrast to the "inextricably intertwined" approach to which the Court had previously alluded in *Swint*.

At the same time, whether the defendants in *Hartman* were entitled to qualified immunity *did* turn largely on the question the Supreme Court decided – *i.e.*, whether it was clearly established that a criminal prosecution could be retaliatory or malicious even if the government had probable cause to sustain the indictment. And so there is a logical argument that the issue the Court resolved in *Hartman was* "inextricably intertwined" with the defendants' entitlement to qualified immunity; at a minimum, it was certainly a necessary antecedent to the D.C. Circuit's rejection of qualified immunity.

 <sup>&</sup>lt;sup>29</sup> See Moore v. Hartman, 388 F.3d 871 (D.C. Cir. 2004), rev'd, 547 U.S. 250 (2006).
<sup>30</sup> Hartman, 547 U.S. at 257 n.5.

<sup>&</sup>lt;sup>31</sup> Another possibility is that the Supreme Court's appellate jurisdiction *differs* from that of appellate courts, insofar as the Court may take jurisdiction as soon as a "case" is "in" the court of appeals, without regard to finality. 28 U.S.C. § 1254; *see, e.g.*, Hohn v. United States, 524 U.S. 236 (1998). So understood, as long as a court of appeals can exercise interlocutory appellate jurisdiction over any part of a case, the Supreme Court may take the entire case as soon as such jurisdiction is established. I thank Will Baude for raising this point – although, as I explain below, there are reasons why it fails to persuade. *See infra* note 34.

The same cannot be said about the Court's next comparable decision. In *Wilkie v. Robbins*, the court of appeals had rejected, on interlocutory appeal, the defendant's entitlement to qualified immunity on a *Bivens* claim.<sup>32</sup> The Supreme Court reversed – holding not that the court of appeals' immunity analysis was incorrect, but that the plaintiff had failed to state a *Bivens* claim.<sup>33</sup> In explaining why the court of appeals' jurisdiction (and through it, that of the Supreme Court) extended to that issue, Justice Souter again dropped a cursory footnote:

We recognized just last Term that the definition of an element of the asserted cause of action was "directly implicated by the defense of qualified immunity and properly before us on interlocutory appeal." Because the same reasoning applies to the recognition of the entire cause of action, the Court of Appeals had jurisdiction over this issue, as do we.<sup>34</sup>

Leaving aside the lack of analysis in *Hartman*, it hardly follows that "the same reasoning applies to the recognition of the entire cause of action." As *Hartman* demonstrates, qualified immunity may well depend upon the specific *elements* of the plaintiff's claim (in ascertaining what law was "clearly established"), but not upon a failure to state a claim in general. Indeed, recall that in *Mitchell*, Justice White had expressly *distinguished* arguments that the plaintiff failed to state a claim in explaining why qualified immunity appeals were

<sup>&</sup>lt;sup>32</sup> See 433 F.3d 755 (10th Cir. 2006), rev'd, 551 U.S. 537 (2007).

<sup>33 551</sup> U.S. at 549-62.

<sup>&</sup>lt;sup>34</sup> *Id.* at 549 n.4 (citing *Hartman*, 547 U.S. at 257 n.5). Although one might defend *Hartman*, *Wilkie*, and *Iqbal* on the ground that, whether or not the circuit court had interlocutory jurisdiction over these other issues, the Supreme Court certainly did once the case was "in" the court of appeals, *see supra* note 31, the Court itself appeared to view its jurisdiction vis-à-vis the lower courts as coterminous with the circuit court's jurisdiction over the district court – perhaps because the Court's jurisdiction, insofar as it encompasses "cases in" the courts of appeals, *see* 28 U.S.C. § 1254, only encompasses those aspects of the "case" that were properly "in" the intermediate appellate court. In any event, this view would only justify *these* decisions – and not the subsequent *lower-court* decisions exercising pendent appellate jurisdiction.

properly within the scope of the collateral order doctrine in the first place.<sup>35</sup> And yet, as in *Hartman*, this expansion of pendent appellate jurisdiction came without discussion. Unlike in *Hartman*, it also made no sense.

In its most recent decision so expanding the scope of qualified immunity appeals, the Court provided a bit more analysis. Thus, in *Ashcroft v. Iqbal*, as in *Hartman* and *Wilkie*, the court of appeals affirmed the district court's denial of qualified immunity on interlocutory appeal,<sup>36</sup> only to have the Supreme Court reverse – this time in light of the plaintiffs' failure to plead their allegations with the requisite specificity.<sup>37</sup> In explaining why appellate jurisdiction extended to the plaintiffs' satisfaction of the relevant pleading standard, Justice Kennedy relied upon *Hartman* and *Wilkie*:

These cases cannot be squared with respondent's argument that the collateral-order doctrine restricts appellate jurisdiction to the "ultimate issu[e]" whether the legal wrong asserted was a violation of clearly established law while excluding the question whether the facts pleaded establish such a violation. Indeed, the latter question is even more clearly within the category of appealable decisions than the questions presented in *Hartman* and *Wilkie*, since whether a particular complaint sufficiently alleges a clearly established violation of law cannot be decided in isolation from the facts pleaded.<sup>38</sup>

Of course, in *Iqbal*, as in *Wilkie*, the Court did not disturb the Second Circuit's holding that the facts as alleged *did* state a violation of clearly established law; it merely held that they were insufficient to support the plaintiffs' underlying claim. *Iqbal* thereby confirms what *Hartman* and *Wilkie* had at most insinuated: even where the district court's denial of qualified immunity is not disturbed, such a denial can form the basis for an interlocutory appeal, and pendent appellate jurisdiction can fashion a basis for appellate courts to re-

<sup>&</sup>lt;sup>35</sup> See supra text accompanying note 20.

<sup>&</sup>lt;sup>36</sup> See Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007), rev'd, 556 U.S. 662 (2009).

<sup>&</sup>lt;sup>37</sup> See Iqbal, 556 U.S. at 677-87.

<sup>&</sup>lt;sup>38</sup> *Id.* at 673 (alteration in original).

solve *any* other legal issue (including those not appealable directly under the collateral order doctrine), even if the underlying immunity determination is never revisited or in any way affected by the exercise of such pendent appellate review.<sup>39</sup> In short, the *Hart-man/Wilkie/Iqbal* approach allows government-officer-defendants to obtain interlocutory appellate review of a universe of legal claims through bootstrapping – using a non-meritorious qualified immunity appeal as the jurisdictional hook, and then using the pendent appellate jurisdiction sanctioned in those three cases to justify review of other legal arguments.

To understand the significance of these holdings, consider two recent cases – both of which involved *Bivens* claims by U.S. military contractors arising out of alleged abuses they suffered at the hands of U.S. servicemembers while working in Iraq. In both *Doe v. Rumsfeld*<sup>40</sup> and *Vance v. Rumsfeld*,<sup>41</sup> the district courts denied the officer-defendants' motions to dismiss based upon qualified immunity at least in part, and the defendants appealed those denials. And on appeal, the D.C. Circuit and the en banc Seventh Circuit both terminated the litigation by declining to recognize a *Bivens* claim – that is, they did not revisit the trial court's qualified immunity analysis, but instead ordered the suit dismissed for an independent reason that would not itself have provided the basis for an interlocutory appeal. In support of such jurisdictional analysis, both decisions cited some combination of *Hartman*, *Wilkie*, and *Iqbal*.<sup>42</sup>

Perhaps not coincidentally, *Doe* and *Vance* – like *Hartman*, *Wilkie*, and *Iqbal* – were *Bivens* suits, and so one explanation for the courts' jurisdictional bootstrapping could simply be their more general aversion to recognizing *Bivens* claims, especially in national security cases.<sup>43</sup> But this approach to pendent appellate jurisdiction in official

<sup>&</sup>lt;sup>39</sup> See, e.g., id. at 674 (distinguishing *Johnson* v. *Jones* because the question presented in *Iqbal* was an "abstract . . . issue[] of law").

<sup>&</sup>lt;sup>40</sup> 800 F. Supp. 2d 94 (D.D.C. 2011), rev'd, 683 F.3d 390 (D.C. Cir. 2012).

<sup>&</sup>lt;sup>41</sup> 694 F. Supp. 2d 957 (N.D. Ill. 2010), rev'd, 701 F.3d 193 (7th Cir. 2012) (en banc).

<sup>&</sup>lt;sup>42</sup> See Vance, 701 F.3d at 197-98; Doe, 683 F.3d at 393.

<sup>&</sup>lt;sup>43</sup> For criticisms of this aversion, see Vázquez & Vladeck, *supra* note 15; and Stephen

immunity appeals is hardly limited in either its logic or its language to *Bivens* claims. The Seventh Circuit, to take just one example, has applied the same reasoning to decide whether the Age Discrimination in Employment Act provides the kind of comprehensive enforcement scheme that displaces suits under 42 U.S.C. § 1983 – using the district court's denial of qualified immunity as the source of its interlocutory appellate jurisdiction.<sup>44</sup> As decisions like these proliferate, the cryptic discussions in *Hartman*, *Wilkie*, and *Iqbal* provide little in the way of a limiting principle.

#### III. IMPLICATIONS

Indeed, not only is the approach to pendent appellate jurisdiction in *Hartman*, *Wilkie*, and *Iqbal* not limited to *Bivens* suits, it isn't even necessarily limited to cases in which the basis for interlocutory appellate jurisdiction is the district court's denial of qualified immunity. Taken at face value, the Court's language in *Iqbal*, in particular, makes it difficult to see why pendent appellate jurisdiction could not be used in *any* class of recognized collateral order appeals, so long as there was some logical relationship between the properly appealed collateral order and the issue over which pendent appellate jurisdiction was exercised.

But even in the context of officer suits, the potential implications are breathtaking. As long as a defendant's appeal of a denial of qualified immunity isn't frivolous, *Hartman*, *Wilkie*, and *Iqbal* can fairly be read to suggest that courts of appeals can then be seized of pendent appellate jurisdiction over virtually any other legal issue, no matter its relation to the merits or to the basis for interlocutory appellate review. Practically, the consequence of such bootstrapping would be to add substantial costs to officer suits, especially those in which the plaintiff ought to prevail on the merits - i.e., those in which these added costs ultimately shouldn't have any bearing on the outcome. As the Court explained in the *Digital Equipment* case,

I. Vladeck, *National Security and Bivens After* Iqbal, 14 LEWIS & CLARK L. REV. 255 (2010).

<sup>&</sup>lt;sup>44</sup> See, e.g., Levin v. Madigan, 692 F.3d 607, 610-11 (7th Cir. 2012).

it would be no consolation that a party's meritless . . . [pre-trial motion] was rejected on immediate appeal; the damage to the efficient and congressionally mandated allocation of judicial responsibility would be done, and any improper purpose the appellant might have had in saddling its opponent with cost and delay would be accomplished.<sup>45</sup>

Although this concern was already present under *Mitchell* for cases in which the officer is ultimately not entitled to qualified immunity, expanding the number of issues that can be litigated on interlocutory appeal could materially increase the economic and logistical resources that both the parties and the courts would need to expend in order to resolve such appeals – at the cost of efficient judicial administration. And as Justice Brennan pointed out with more than a little irony in his *Mitchell* dissent, such appeals also increase the cost of litigation for the public and the defendant in any case in which the appeal is unsuccessful – costs that the collateral order doctrine specifically exists to minimize, not exacerbate.<sup>46</sup>

Separate from the added *costs* of such an expansive scope of interlocutory appellate review in officer suits, these cases also risk fundamentally destabilizing the longstanding analytical distinction between a defendant's immunity from suit and his defenses to liability. Thus, whereas the Supreme Court has long cautioned against "play[ing] word games with the concept of a 'right not to be tried,"<sup>#7</sup> its jurisprudence has nevertheless coalesced around a relatively stable distinction – focusing on whether the "immunity" at issue is, in essence, a right possessed by the defendant to not stand trial *at all*. Even the most complete defenses will not satisfy this exacting standard if they merely establish the defendant's right "not to be subject to a binding judgment of the court," as opposed to his right to avoid being haled into court in the first place.<sup>48</sup> And outside the context of suits against government officers, this distinction can

<sup>&</sup>lt;sup>45</sup> Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 873 (1994).

<sup>&</sup>lt;sup>46</sup> Mitchell v. Forsyth, 472 U.S. 511, 555 n.9 (1985) (Brennan, J., dissenting).

<sup>&</sup>lt;sup>47</sup> Midland Asphalt Corp. v. United States, 489 U.S. 794, 801 (1989).

<sup>&</sup>lt;sup>48</sup> Van Cauwenberghe v. Biard, 486 U.S. 517, 527 (1988).

still prove dispositive – as the en banc Fourth Circuit's recent decision rejecting interlocutory appellate jurisdiction in the Abu Ghraib contractor torture case illustrates.<sup>49</sup>

But to the extent that pendent appellate jurisdiction allows officer-defendants to use the specter of official immunity as an endrun around the final judgment rule, the effect will be to collapse the distinction between immunity from suit and defenses to liability, since both will now be subject to adjudication - and to immediate appeal - at both the motion-to-dismiss and summary judgment stages of litigation. There is certainly no constitutional problem with such a piecemeal arrangement, but it is difficult to reconcile such an approach with the analytical underpinnings of the collateral order doctrine – or with the more fundamental statutory final judgment rule from which that doctrine delicately departs. For these doctrines to make sense, pendent appellate jurisdiction should only be available in collateral order appeals "where essential to the resolution of properly appealed collateral orders."50 Put another way, only where the appellate court cannot resolve the propriety of the collateral order under review without adjudicating a necessarily antecedent legal question should it have interlocutory appellate jurisdiction to resolve that question, as well.

If the Justices intended in *Hartman*, *Wilkie*, and *Iqbal* to turn this understanding on its head, even if only in officer suits, one could at least have expected them to say more about it. Had they done so, they might have realized that such a result is incredibly difficult to defend as a matter of law, policy, precedent, or prudence.



<sup>&</sup>lt;sup>49</sup> See Al Shimari v. CACI Int'l, Inc., 679 F.3d 205 (4th Cir. 2012) (en banc) (dividing 11-3 over whether the district court's rejection of various defenses to suit by military contractors could be immediately appealed as a collateral order).

<sup>&</sup>lt;sup>50</sup> Kanji, *supra* note 26, at 530.