The Burger Court Opinion Writing Database

Butz v. Economou

438 U.S. 478 (1978)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

December 27, 1977

Dear Bill:

Re: 76-709 Butz v. Economou

The Solicitor General's brief presents nothing to change my initial view in this case.

I am prepared to join an opinion generally along the lines of your memorandum of December 22.

Regards,

WEB

Mr. Justice Rehnquist
cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

March 6, 1978

RE: 76-709 - Butz v. Economou

Dear Bill:

On the vote at today's Conference, I assume that you will proceed to assign the above case.

Regards,

WEB

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 21, 1978

RE: 76-709 - Butz v. Economou

Dear Bill:

I join your "concurring - dissent."

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 14, 1977

RE: No. 76-558 Raymond Motor Transportation v. Rice
No. 76-709 Bergland v. Economou

Dear Chief:

My apologies. Obviously my record in No. 76-558 is in error since it shows you to affirm rather than reverse. I have corrected it.

On No. 76-709 I would interpret the votes differently but I certainly don't press the point.

Sincerely,

Bill

The Chief Justice

cc: The Conference

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 2 MAR 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–709

Earl L. Butz et al., Petitioners, *v.* Arthur N. Economou et al. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March —, 1978]

Memorandum of MR. JUSTICE BRENNAN.

I agree with my Brother WHITE that "[s]urely *federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do *state* officers, Memorandum, at 14 (emphasis in orginal), and that federal executive officials, other than those entitled to an absolute immunity because they are acting in a judicial or prosecutorial capacity, should be afforded only a qualified immunity defense when they are charged with committing constitutional torts. Because the federal courts are presently unconstrained by any governing statute in exercising their special competence to fashion the law governing tort actions arising directly under the Constitution, and given that the doctrine of official immunity " 'has in large part been of judicial making,' " *Doe* v. *McMillan*, 412 U. S. 306, 318–319 (1973); *Barr* v. *Mateo*, 360 U. S. 564, 569 (1959), and that damages are a "remedial mechanism normally available in the federal courts," *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 397 (1971), a contrary result would place the federal judiciary in the anomalous position of freely choosing to sanction a more vigorous enforcement of constitutional guarantees against state officials than against federal officials in the federal courts. Such a result is untenable. Unlike my Brother WHITE, however, I believe that the absolute immunity afforded federal

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 8, 1978

RE: No. 76-709 Butz v. Economou

Dear Byron:

My circulation was in the form of a printed memorandum circulated on March 2 last. This memorandum was circulated after the memos you, Lewis and Bill circulated.

Depending on what revisions in it you may make, my present intention is to join your opinion circulated May 15 insofar as it holds that the federal nonjudicial and nonprosecutorial defendants are not entitled to an absolute immunity for constitutional torts, but to go further along the lines of my memorandum of March 2.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 14, 1978

RE: No. 76-709 Butz v. Economou

Dear Byron:

The changes in today's circulation make it possible for me to join fully and I do join. I haven't decided whether I shall write further.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 16, 1978

RE: No. 76-709 Butz v. Economou, et al.

Dear Byron:

I join your opinion and will not write.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 13, 1978

No. 76-709, Butz v. Economou

Dear Bill,

I am in basic agreement with your memorandum in this case.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 16, 1978

No. 76-709, Butz v. Economou

Dear Bill,

Please add my name to your separate opinion in this case.

Sincerely yours,

P.S.
1.S.

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 5, 1978

Re: Earl L. Butz et al.,
v. Arthur N. Economou et al.
No. 76-709

Dear Bill,

I now anticipate that in due course I shall circulate a memorandum in this case reflecting the views I expressed in Conference and dissenting in part with the memorandum you have circulated.

Sincerely yours,

Byron

Mr. Justice Rehnquist

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 1/30

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-709

Earl L. Butz et al., Petitioners, *v.* Arthur N. Economou et al. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February —, 1978]

Memorandum of MR. JUSTICE WHITE.

I

It is important to note at the outset the procedural posture of this case. Almost immediately after the filing of respondent's second amended complaint requesting damages, petitioners moved to dismiss the complaint on the ground that "as to the individual defendants it is barred by the doctrine of official immunity." App., at 163. The District Court granted the motion. It held that petitioners could claim immunity for all acts which were within the outer perimeter of their authority and which involved the exercise of discretion. The District Court found that all of the acts upon which respondent's claim was predicated met that description. The District Court did not analyze whether respondent had stated a valid common law or statutory claim for relief. Nor did the District Court consider whether respondent had stated a valid claim for damages for violation of a constitutional right on the theory of this Court's decision in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U. S. 388 (1971).

In support of the judgment of the District Court, the Government argues that Federal Government officials have

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 5-7, 14, 16-19, 25-26

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 2/15

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-709

Earl L. Butz et al., Petitioners, *v.* Arthur N. Economou et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February —, 1978]

Memorandum of MR. JUSTICE WHITE.

II

It is important to note at the outset the procedural posture of this case. Almost immediately after the filing of respondent's second amended complaint requesting damages, petitioners moved to dismiss the complaint on the ground that "as to the individual defendants it is barred by the doctrine of official immunity." App., at 163. The District Court granted the motion. It held that petitioners could claim immunity for all acts which were within the outer perimeter of their authority and which involved the exercise of discretion. The District Court found that all of the acts upon which respondent's claim was predicated met that description. The District Court did not analyze whether respondent had stated a valid common law or statutory claim for relief. Nor did the District Court consider whether respondent had stated a valid claim for damages for violation of a constitutional right on the theory of this Court's decision in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U. S. 388 (1971).

In support of the judgment of the District Court, the Government argues that Federal Government officials have

BRW
Please join me

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 3, 9, 10, 14, 18, 38.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 5/18

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–709

Earl L. Butz et al., Petitioners, *v.* Arthur N. Economou et al. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May —, 1978]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case concerns the personal immunity of federal officials in the Executive Branch from claims for damages arising from their violations of citizens' constitutional rights. Respondent [1] filed suit against a number of officials in the Department of Agriculture claiming that they had instituted an investigation and an administrative proceeding against him in retaliation for his criticism of that agency. The District Court dismissed the action on the ground that the individual defendants, as federal officials, were entitled to absolute immunity for all discretionary acts within the scope of their authority. The Court of Appeals reversed, holding that the defendants were entitled only to the qualified immunity available to their counterparts in state government. 535 F. 2d 688. Because of the importance of immunity doctrine to both the vindication of constitutional guarantees and the effective functioning of government, we granted certiorari. — U. S. —.

[1] The individual Arthur N. Economou, his corporation Arthur N. Economou and Co., and another corporation which he heads, The American Board of Trade, Inc., were all plaintiffs in this action and are all respondents in this Court. For convenience, however, we refer to Arthur N. Economou and his interests in the singular, as "respondent."

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 14, 1978

MEMORANDUM TO THE CONFERENCE

Re: 76-709 - Butz v. Economou

I enclose the following:

1. Page 7 of my circulation of May 18 with the indicated revisions, including a revised note 8 set out on a separate sheet.

2. Page 16 of the same draft with the indicated change and a new footnote 22 which is also attached.

These changes have been sent to the printer together with stylistic changes.

B.R.W.

BRW
I am still with you

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 15, 1978

MEMORANDUM TO THE CONFERENCE

Re: 76-709 - Butz v. Economou

The fifth sentence on page 28 of the circulating opinion reads as follows:

> "Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibility that artful pleading may disguise a common law claim in constitutional clothing."

At Bill Brennan's request, I am changing the sentence to read:

> "Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading."

Of course, this assumes that the change is agreeable to others who have joined.

BRW

pp 7, 13, 16, 25, 26, 28, 29, 30, 34, 35, 36, 37, 38

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 6-16-78

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–709

Earl L. Butz et al., Petitioners, *v.* Arthur N. Economou et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May —, 1978]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case concerns the personal immunity of federal officials in the Executive Branch from claims for damages arising from their violations of citizens' constitutional rights. Respondent [1] filed suit against a number of officials in the Department of Agriculture claiming that they had instituted an investigation and an administrative proceeding against him in retaliation for his criticism of that agency. The District Court dismissed the action on the ground that the individual defendants, as federal officials, were entitled to absolute immunity for all discretionary acts within the scope of their authority. The Court of Appeals reversed, holding that the defendants were entitled only to the qualified immunity available to their counterparts in state government. 535 F. 2d 688. Because of the importance of immunity doctrine to both the vindication of constitutional guarantees and the effective functioning of government, we granted certiorari. — U. S. —.

[1] The individual Arthur N. Economou, his corporation Arthur N. Economou and Co., and another corporation which he heads, The American Board of Trade, Inc., were all plaintiffs in this action and are all respondents in this Court. For convenience, however, we refer to Arthur N. Economou and his interests in the singular, as "respondent."

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 19, 1978

MEMORANDUM TO THE CONFERENCE

Re: 76-709 - Butz v. Economou

I have sent to the printer the attached addition to footnote 30 in Butz.

B. R. W.

Attachment

damage actions against officers of Government has "in large part been of judicial making." *Barr* v. *Matteo, supra,* at 569; *Doe* v. *McMillan,* 412 U. S. 306, 318 (1973). Section 1 of the Civil Rights Act of 1871 [29]—the predecessor of § 1983—said nothing about immunity for state officials. It mandated that any person who under color of state law subjected another to the deprivation of his constitutional rights would be liable to the injured party in an action at law.[30] This Court nevertheless ascertained and announced what it deemed to be the appropriate type of immunity from § 1983 liability in a variety of contexts. *Pierson* v. *Ray, supra; Imbler* v.

[29] Section 1 of the Civil Rights Act of 1871, 17 Stat. 14, provided in pertinent part:

"That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law. . . ."

[30] The purpose of § 1 of the Civil Rights Act was not to abolish the immunities available at common law, see *Pierson* v. *Ray, supra,* at 554, but to insure that federal courts would have jurisdiction of constitutional claims against state officials. We explained in *District of Columbia* v. *Carter,* 409 U. S. 418, 427 (1973):

"At the time this Act was adopted. . . . there was no general federal-question jurisdiction in the lower federal ccourts. Rather, 'Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws.' *Zwickler* v. *Koota,* 389 U. S. 241, 245 (1967). With growing awareness that this reliance had been misplaced, however, Congress recognized the need for original federal court jurisdiction as a means to provide at least indirect federal control over the unconstitutional actions of state officials." (Footnotes omitted.)

The situation with respect to federal officials was entirely different: they were already subject to judicial control through the state courts, which were not particularly sympathetic to federal officials, or through the removal jurisdiction of the federal courts. See generally *Willingham v. Morgan,* 395 U. S. 402; *Tennessee* v. *Davis,* 100 U. S. 257 (1880). Moreover, in 1875 Congress vested the circuit courts with general federal question jurisdiction, which encompassed many suits against federal officials. 18 Stat. 470. Thus, the absence of a statute similar to §1983 pertaining to federal officials cannot be the basis for an inference about the level of immunity appropriate to federal officials.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 21, 1978

Re: No. 76-709 — Butz v. Economou

Dear Bill:

I have your suggested addition to your dissent in Butz. I plan no further response. We have already said that in our view it is unnecessary to countenance a regime of deliberate lawlessness, as you would, in order to achieve an efficient Federal Government. We would treat the latter like we think Congress has treated state governments.

Of course, you cite to McSurely at page 20 and in footnote 1 in your Butz dissent. Unless those are eliminated, Butz will be held up, although all the votes are now in. Of course, that is your choice.

Sincerely yours,

Mr. Justice Rehnquist

Copies to the Conference

√

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall ✓
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 2 3

3rd DRAFT

From: Mr. Justice White

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: 6-23-78

No. 76-709

Earl L. Butz et al., Petitioners, *v.* Arthur N. Economou et al. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May —, 1978]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case concerns the personal immunity of federal officials in the Executive Branch from claims for damages arising from their violations of citizens' constitutional rights. Respondent [1] filed suit against a number of officials in the Department of Agriculture claiming that they had instituted an investigation and an administrative proceeding against him in retaliation for his criticism of that agency. The District Court dismissed the action on the ground that the individual defendants, as federal officials, were entitled to absolute immunity for all discretionary acts within the scope of their authority. The Court of Appeals reversed, holding that the defendants were entitled only to the qualified immunity available to their counterparts in state government. 535 F. 2d 688. Because of the importance of immunity doctrine to both the vindication of constitutional guarantees and the effective functioning of government, we granted certiorari. — U. S. —.

[1] The individual Arthur N. Economou, his corporation Arthur N. Economou and Co., and another corporation which he heads, The American Board of Trade, Inc., were all plaintiffs in this action and are all respondents in this Court. For convenience, however, we refer to Arthur N. Economou and his interests in the singular, as "respondent."

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 27, 1978

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for 76-709 - Butz v. Economou

No. 76-418 - Expeditions Unlimited Aquatic Enterprises, Inc., v. Smithsonian Institution.

The District Court granted summary judgment for defendant in a libel suit against the Smithsonian, its Regents and Evans, one of its anthropologists. The Court of Appeals affirmed the dismissal, except as to Evans, on the ground that the Tort Claims Act did not permit such a suit against the Smithsonian. As to Evans, the Court of Appeals held that he was immune under Barr if acting within his authority and remanded to determine that issue.

On the reach of the Tort Claims Act there is a mild conflict with Baker, 489 F.2d 829, but the Government makes a strong legislative history argument, and I would let this one simmer. On the immunity point, Barr would support the judgment; besides, it has not yet been determined that Evans was acting within his authority.

It also appears here that the appeal to the Court of Appeals may have been out of time because the District Court neglected until too late to notify either side that judgment had been entered. The Court of Appeals rejected the jurisdictional challenge. All in all, a denial is good enough for this case.

No. 77-174 - Machen v. Patterson.

Petitioner, an army officer experiencing friction with his supervisor, wrote a letter to a higher ranking officer. Petitioner's supervisor prepared a responsive memo. Petitioner filed this suit claiming that respondent had defamed him in that memo. During the trial, petitioner noticed that respondent's attorneys possessed a prior fitness report containing offensive comments about petitioner that had been ordered deleted by an army appeal board. Petitioner then filed a second libel action against respondent.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 8, 1978

Re: No. 76-709 - Butz v. Economou

Dear Byron:

Please join me.

Sincerely,

T.M.

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 14, 1978

Re: No. 76-709 - Butz v. Economou

Dear Byron:

I am still with you.

Sincerely,

T.M.

Mr. Justice White

cc: The Conference

✓

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 15, 1978

Re: No. 76-709 - Butz v. Economou

Dear Byron:

Please join me.

Sincerely,

Harry

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 6, 1978

No. 76-709 Butz v. Economou

Dear Bill:

Byron's note of yesterday prompts me to say that I, also, have been working on a memorandum reflecting the views I expressed in Conference. They differ in rationale from much of your memorandum, although in the end I may come out where you do with respect to most - if not all - of the defendants in this particular case.

Although I am not sure that my views coincide fully with Byron's, my notes indicate that we were in agreement tentatively that a line should be drawn between a claim of constitutional violation and one merely of tortious conduct (as was the case in Barr). I will now await Byron's memorandum before circulating one myself.

Sincerely,

Lewis

Mr. Justice Rehnquist

Copies to the Conference

LFP/lab

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 3, 1978

Re: No. 76-709, Butz v. Economou

Dear Byron:

I am in substantial agreement with your memorandum of January 30, 1978. I concur fully in the view that there should be a uniform rule to govern the adjudication of "constitutional tort" claims. The interests of the plaintiff and the potential impact on the exercise of executive discretion are the same whether the suit is brought against a federal official under the rationale of Bivens or against his state counterpart under § 1983. We do harm to logic as well as to the spirit of federalism if, in the words of Griffin Bell, "we have one law for Athens and another for Rome." Anderson v. Nosser, 438 F.2d 183, 205 (CA 5 1971) (concurring opinion).

In view of the substantial congruity of our views, I do not intend to circulate a full memorandu, and hope yours will become a Court opinion. I do have these comments, that may merit your consideration.

In Scheuer we rejected a general rule of absolute

I called Byron on 6/7 & offered to help. He will let me know.

May 27, 1978

No. 76-709, Butz v. Economou

Dear Byron,

I spent Friday evening (three hours!) reading carefully your draft opinion for the Court. It is an exceptionally fine opinion. I will happily join it and will do so without separate comment, if you can accommodate two modest suggestions. First, I would like to make clear that this case, in its present posture, concerns only constitutional claims, and therefore the rule of Barr v. Mateo for common-law claims is left undisturbed. I appreciate that the reservation is implicit in your discussion, but your statement about Barr's "silent extension of immunity with respect to state tort claims" may be read as a retreat from Barr. As you point out, the fact that John Harlan authored both Barr and the concurring opinion in Bivens suggests that your approach in this case is on firm ground.

Part I

Second, the breadth of your statements about the holding in Bivens (pp. 7, 25) concerns me. While you may be right in saying that "Bivens established the general principle that compensable injury to constitutionally protected interests could be vindicated by suits for damages," that decision involved only a Fourth Amendment claim, for which a private damages action is rooted in the history of the Amendment, see Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (1765). In light of your sound observation (p. 24) that prudential considerations may bar Bivens' extension to other constitutional interests, I would prefer that we make explicit in footnote 8 that Bivens involved a Fourth Amendment claim, and that we simply pretermit the issue whether Bivens extends to other contexts. See Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274, 278-279 (1977); Doe v. McMillan, 412 U.S. 306, 325 (1973).

I should have said at the outset that I appreciate your meeting substantially the points that I raised in my memorandum of February 3.

Sincerely,

Mr. Justice White

lfp/ss

June 13, 1978

No. 76-709 Butz v. Economou

Dear Byron:

Thank you for the changes that substantially meet the suggestions I made earlier.

I will join you promptly when you recirculate, or - if you prefer - I will join you now.

Depending upon what Bill Brennan writes, I may add a concurring sentence to the effect that I do not view anything in your opinion as casting doubt on the continued vitality of Barr with respect to nonconstitutional state-law claims.

I return your "master" herewith.

Sincerely,

Mr. Justice White

lfp/ss
Enc.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 13, 1978

No. 76-709 Butz v. Economou

Dear Byron:

Please join me.

Sincerely,

L. Lewis

Mr. Justice White

lfp/ss

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: DEC 21 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-709

Earl L. Butz et al., Petitioners, *v.* Arthur N. Economou et al. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January —, 1978]

Memorandum of MR. JUSTICE REHNQUIST.

Respondents sued the Secretary of Agriculture, the Assistant Secretary of Agriculture, and other officials of the Department of Agriculture and of the Commodity Exchange Authority in the United States District Court. They asserted a variety of grounds for federal jurisdiction, and prayed for damages in the amount of $32 million. The District Court, without addressing the question of jurisdiction, granted the motion of petitioners (the individual governmental defendants) to dismiss, holding that *all* of them were absolutely immune from suit for money damages under the decided cases of this Court. The Court of Appeals for the Second Circuit reversed this order of the District Court, holding in effect that *none* of the federal officials sued was entitled to absolute immunity [1] even though each was acting within the outer limits of his authority.[2]

[1] Respondents also named the Department of Agriculture and the Commodity Exchange Authority as defendants in the action in the District Court. That court likewise dismissed the complaint as to those defendants, and the Court of Appeals affirmed that portion of the ruling on the authority of *Blackmar* v. *Guerre*, 342 U. S. 512 (1952). Only petitioners sought review here of the judgment of the Court of Appeals.

[2] We note that this case poses no question as to whether any petitioner was acting within the outer limits of his line of duty. The District Court found that they were and we do not read the Court of Appeals opinion as casting any doubt on that proposition.

pp. 12, 15, 18, 19

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: DEC 22 1977

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-709

Earl L. Butz et al., Petitioners, v. Arthur N. Economou et al. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January —, 1978]

Memorandum of MR. JUSTICE REHNQUIST.

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[2] We note that this case poses no question as to whether any petitioner was acting within the outer limits of his line of duty. The District Court found that they were and we do not read the Court of Appeals opinion as casting any doubt on that proposition.

Pp 3,5,11,17,19

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: JAN 2 0 1978

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-709

Earl L. Butz et al., Petitioners, *v.* Arthur N. Economou et al. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January —, 1978]

Memorandum of MR. JUSTICE REHNQUIST.

Respondents sued the Secretary of Agriculture, the Assistant Secretary of Agriculture, and other officials of the Department of Agriculture and of the Commodity Exchange Authority in the United States District Court. They asserted a variety of grounds for federal jurisdiction, and prayed for damages in the amount of $32 million. The District Court, without addressing the question of jurisdiction, granted the motion of petitioners (the individual governmental defendants) to dismiss, holding that *all* of them were absolutely immune from suit for money damages under the decided cases of this Court. The Court of Appeals for the Second Circuit reversed this order of the District Court, holding in effect that *none* of the federal officials sued was entitled to absolute immunity [1] even though each was acting within the outer limits of his authority.[2]

[1] Respondents also named the Department of Agriculture and the Commodity Exchange Authority as defendants in the action in the District Court. That court likewise dismissed the complaint as to those defendants, and the Court of Appeals affirmed that portion of the ruling on the authority of *Blackmar* v. *Guerre*, 342 U. S. 512 (1952). Only petitioners sought review here of the judgment of the Court of Appeals.

[2] We note that this case poses no question as to whether any petitioner was acting within the outer limits of his line of duty. The District Court found that they were and we do not read the Court of Appeals opinion as casting any doubt on that proposition.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 30, 1978

Re: No. 76-709 Butz, et al v. Economou, et al.

Dear Byron:

In response to your memorandum circulated January 30, I propose to add the following four footnotes to the third draft of my memorandum circulated January 20:

2a (to go at the end of the second sentence in the second paragraph beginning on page 2)

Mr. Justice White cites for the proposition that "the high position of a government official would not insulate his action from judicial review" the cases of Marbury v. Madison, 1 Cranch 137 (1803), and Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). But as his memorandum recognizes, both of these cases involved equitable type relief by way of mandamus or injunction. In the present case, respondent sought damages in the amount of $22 million. There is undoubtedly force to the argument that injunctive relief sets the matter right only as to the future in these cases where a court determines that an official defendant has violated a legal right of the plaintiff. But there is at least as much force to the argument that the threat of injunctive relief without the possibility of damages in the case of a Cabinet official is a better tailoring of the competing needs to vindicate individual rights, on the one hand, and the equally vital need "that federal officials exercising discretion will be unafraid to take vigorous action to further the public interest." Memorandum of Mr. Justice White, page 12.

4a (to go at the end of the third sentence of text on page 7)

The memorandum of Mr. Justice White, in the guise of interpreting the landmark case of Spalding v. Vilas, 161 U.S. 483

(1896), virtually overrules it. The court there did indeed hold that the actions taken by the Postmaster General were within the authority conferred upon him by Congress, and went on to hold that even though he had acted maliciously in carrying out the duties conferred upon him by Congress he was protected by official immunity. But Mr. Justice White neglects to mention this critical language in the opinion:

> "We are of the opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of executive departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts." 161 U.S. 483, 498.

But the quoted language could equally be applied to this case. No one contends that the Secretary of Agriculture or the Assistant to the Secretary of Agriculture, who are being sued for $22 million in damages, had wandered completely off the official reservation in authorizing prosecution of respondent for violation of regulations promulgated by Secretary for the Regulation of "futures commission merchants," 7 U.S.C. § 6. That is precisely what they were empowered and required to do. That they would on occasion be mistaken in their judgment that a particular respondent had in fact violated the regulations is a necessary concomitant of any known system of administrative adjudication; that they acted "maliciously" gives no support to respondent's claim against them unless we are to overrule Spalding v. Vilas. The only difference between that case and this is that here respondent plaintiffs claim that the result of official action was a violation of their constitutional rights. But if we allow such an allegation, obviously unproven at the time made, to require a Cabinet-level official charged by law with the enforcement of

the responsibilities to which the complaint pertains to defend the action on the merits, the defense of official immunity will have been abolished in fact if not in form. The ease with which a constitutional claim may be pleaded in a case such as this, where violation of statutory or judicial limits on agency action may be readily converted by any legal neophyte into a claim of denial of procedural due process under the Fifth Amendment, will assure that. The fact that the claim fails when put to trial will not prevent the consumption of time, effort, and money on the part of the defendant official in defending his actions on the merits. The result can only be damage to the "interest of the people", Spalding v. Vilas, supra which "required that due protection be accorded to [Cabinet officials] in respect to their official acts." Ibid.

4b (to go at the end of the first full paragraph on page 11)

The memorandum of Mr. Justice White both vacillates and creates doubt as to the authority of Congress to expand or limit the immunity of federal officials. At page 12 of his memorandum, he says "at least in the absence of legislative guidance, the immunity accorded by the courts to federal executives for constitutional violations must provide sufficient protection that federal officials exercising discretion will be unafraid to take vigorous action to further the public interest." Yet at page 14 he expresses concern that my memorandum "would place undue emphasis on the congressional origins of the cause of action in determining the level of immunity. This Court has observed more than once that the law of privilege as a defense to damage actions against officers of government has 'in large part been of judicial making.'" We are faced in this case with a clear distinction between the clear evidence of congressional concern with violation of constitutional rights by state officials reflected in the enactment of § 1983, see Scheuer v. Rhodes, supra, and congressional silence or at best ambivalence with respect to similar actions on the part of federal officials. Either this difference in treatment by Congress is entitled to weight, as I contend in my memorandum, or it is not; but one cannot have it both ways.

4c (to go at the end of the first paragraph of Section III)

In no sense do either Spalding v. Vilas, 161 U.S. 483, nor the memorandum which I have authored in this case, support the suggestion contained in my Brother White's memorandum that absolute immunity should be based "solely on the total amount of power at the disposal of a high ranking official . . . ." It should be apparent from the language just quoted from Spalding that a Cabinet officer's claim for absolute immunity is dependent upon his "keeping within the limits of his authority". There are undoubtedly hypothetical situations in which the claim of a Cabinet officer to absolute immunity for his acts would not prevail, such as where the Secretary of Agriculture seeks to exercise authority clearly denied to him but granted to the Secretary of the Treasury. Thus, it is not the amount of "power" which will cause the claim of a Cabinet officer for absolute immunity to generally succeed, but rather the fact the Cabinet officers have been granted by Congress more authority than subsidiary executive officials. But where the type of action taken by a Cabinet official is one taken "when engaged in the discharge of duties imposed upon them by law", Spalding v. Vilas, supra, page 498, even though in retrospect the action is found to have deprived a plaintiff of a right protected by the Constitution, the public official is nonetheless entitled to absolute immunity. It seems to me that this analysis is far more consistent both with Spalding and with Imbler v. Pachtman, 424 U.S. 409 (1976), than would be a conclusion that only qualified immunity should be accorded in these circumstances. While parts of the memorandum of Mr. Justice White suggest to me the opposite conclusion, my reading of pages 19-20 of his memorandum makes me uncertain as to just what sort of immunity he would accord to the Secretary and the Assistant Secretary here. He suggests that every time the Secretary is sued, and it is conceded that the acts for which he was sued occurred when he was "engaged in the discharge of duties imposed upon [him] by law", Spalding, supra, the Court should nonetheless inquire as to whether "there is a serious possibility that vexatious constitutional litigation will interfere with the decisionmaking process", memorandum of Mr. Justice White, page 20. The court may thereupon accord the Secretary absolut immunity. Id., p. 20. But this is a form of "absolute immunity" which in truth exists in name only. If

the Secretary may never know until inquiry by the Court in which a lawsuit against him is filed whether "there is a serious possibility that vexatious constitutional litigation will interfere with the decisionmaking process" of the Secretary, the Secretary will obviously think not only twice but thrice about whether to prosecute a litigious futures commission merchant. Careful consideration of the rights of every individual subject to his jurisdiction is one thing; a timorous reluctance to prosecute any of such individuals who have a reputation for using litigation as a defensive weapon is quite another. Since Cabinet officials are mortal, it is not likely that we shall get the precise judgmental balance desired in each of them, and it is because of these very human failings that the principles of Spalding, supra and Imbler, supra, dictate that absolute immunity be accorded once it be concluded by a Court that a Cabinet official was "engaged in the discharge of duties imposed upon [him] by law." Spalding, supra.

Sincerely,

Mr. Justice White

Copies to the Conference

pp 2, 3 8-9, 13 14, 15-17

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: FEB 3 1978

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-709

Earl L. Butz et al., Petitioners, v. Arthur N. Economou et al. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January —, 1978]

Memorandum of MR. JUSTICE REHNQUIST.

Respondents sued the Secretary of Agriculture, the Assistant Secretary of Agriculture, and other officials of the Department of Agriculture and of the Commodity Exchange Authority in the United States District Court. They asserted a variety of grounds for federal jurisdiction, and prayed for damages in the amount of $32 million. The District Court, without addressing the question of jurisdiction, granted the motion of petitioners (the individual governmental defendants) to dismiss, holding that *all* of them were absolutely immune from suit for money damages under the decided cases of this Court. The Court of Appeals for the Second Circuit reversed this order of the District Court, holding in effect that *none* of the federal officials sued was entitled to absolute immunity [1] even though each was acting within the outer limits of his authority.[2]

[1] Respondents also named the Department of Agriculture and the Commodity Exchange Authority as defendants in the action in the District Court. That court likewise dismissed the complaint as to those defendants, and the Court of Appeals affirmed that portion of the ruling on the authority of *Blackmar* v. *Guerre*, 342 U. S. 512 (1952). Only petitioners sought review here of the judgment of the Court of Appeals.

[2] We note that this case poses no question as to whether any petitioner was acting within the outer limits of his line of duty. The District Court found that they were and we do not read the Court of Appeals opinion as casting any doubt on that proposition.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 22, 1978

Re: No. 76-709 - Butz v. Economou

Dear Byron:

I am now in the process of converting my original memorandum in this case into a dissent. It seems to me that several of the issues which are necessarily discussed in your opinion are also tied in to McAdams v. McSurely, in which Lewis earlier circulated a memorandum. It would be helpful to me in revising my original memorandum in this case to know what the ultimate disposition in McAdams v. McSurely will be.

Sincerely,

WHR

Mr. Justice White

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: JUN 16 1978

Recirculated: _____

No. 76-709 Butz v. Economou

MR. JUSTICE REHNQUIST, concurring in part and dissenting in part.

I concur in that part of the Court's judgment which affords absolute immunity to those persons performing adjudicatory functions within a federal agency, ante p. 35, those who are responsibile for the decision to initiate or continue a proceeding subject to agency adjudication, ante p. 37, and those agency personnel who present evidence on the record in the course of an adjudication, ante p. 38. I cannot agree, however, with the Court's conclusion that in a suit for damages arising from allegedly unconstitutional

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 21, 1978

Re: No. 76-709 - Butz v. Economou

Dear Byron:

I anticipate adding the attached paragraphs to the presently circulating Xerox text of my dissent in this case. They will begin on page 22.

Sincerely,

Mr. Justice White

Copies to the Conference

Att.

Last paragraphs in WHR dissent in Butz v. Economou.

Today's opinion has shouldered a formidable task insofar as it seeks to justify the rejection of the views of the first Mr. Justice Harlan expressed in his opinion for the Court in Spalding v. Vilas, supra, and those of the second Mr. Justice Harlan expressed in his opinions in Barr v. Matteo, supra, and its companion case of Howard v. Lyons, 360 U.S. 593 (1959). In terms of juridical jousting, if not in terms of placement in the judicial hierarchy, it has taken on at least as formidable a task when it disregards the powerful statement of Judge Learned Hand in Gregoire v. Biddle, supra.

History will surely not condemn the Court for its effort to achieve a more finely ground product from the judicial mill,

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 19, 1978

Re: 76-709 - Butz v. Economou

Dear Bill:

Please join me in your dissenting opinion.

Respectfully,

John

Mr. Justice Rehnquist

Copies to the Conference