

The Burger Court Opinion Writing Database

Nixon v. Fitzgerald

457 U.S. 731 (1982)

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Panel - If Qs ^{in 1st even} are not adequate,

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

*try
framing
one?*

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 16, 1981

*Also, should we
add one on Beverly?*

MEMORANDUM TO THE CONFERENCE

Re: No. 79-1738 - Nixon v. Fitzgerald, and
No. 80-945 - Harlow and Butterfield v. Fitzgerald

If, as is quite likely, certiorari is granted in these two cases, it is possible that there will be different rulings with respect to the President and the other petitioners, i.e., it may be that the President will be held to have absolute immunity but the advisors only qualified immunity. Under their third question presented, the advisors assert that even if they are entitled to only qualified immunity, they should not have been sent to trial.

I write this memorandum to indicate that I remain of the view expressed in the early circulations in Procunier v. Navarette, 434 U.S. 555 (1978), that qualified immunity in cases like this should turn on objective factors, rather than malice or bad faith, whatever these latter considerations may involve. If when the challenged action is taken, it did not contravene a settled law -- that is, it was reasonable for the official to believe that his action was within the law -- I would hold the official immune, whether state or federal, absent some congressional guidance mandating a different result. Turning immunity on objective factors would make far better sense and would go far to avoid needless trials and possibly inaccurate results.

Perhaps this issue is subsumed in the third question in Harlow and Butterfield's petition but it might be advisable to address the question.

BW

June 15, 1981

79-1738 Nixon v. Fitzgerald
80-945 Harlow v. Fitzgerald

Dear Chief:

In light of our discussion of the Kissinger case last Thursday, I will draft and send to the Justices a brief Per Curiam that we can approve finally at next Thursday's Conference.

Meanwhile, with your approval, I am requesting Al Stevas to put the two Fitzgerald cases on the list for next Thursday.

Sincerely,

The Chief Justice

lfp/ss

cc: Mr. Justice Stevens
Mr. Alexander L. Stevas