The Burger Court Opinion Writing Database

Kissinger v. Halperin

452 U.S. 713 (1981)

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

January 15, 1981

Re: No. 79-880, Kissinger v. Halperin

Dear Lewis:

I am in general agreement with your memorandum of January 10 in this case. I have some comments, however. I will treat them under four separate headings.

(1) Claimed absolute immunity of the President from personal liability for civil damages.

In Butz v. Economou, 438 U.S. 478 (1978), Byron's opinion for the Court discussed absolute immunity of judges. He explained that the reason for this absolute immunity is "not because of [judges'] particular location within the government but because of the special nature of their responsibilities," and he went on to say: "This point is underlined by the fact that prosecutors -- themselves members of the Executive Branch - are also absolutely immune." Id., at 511-512. The prosecutor's absolute immunity is, of course, for the acts he performs as a surrogate or extended arm of the President to "take care that the Laws be faithfully executed," as that duty is defined in Article II, Section 3. The prosecutor's immunity necessarily covers a much narrower area than that of the President since the President has far broader duties under Article II than simply enforcement of "the Laws."

Economou makes it clear that a U.S. Attorney as a prosecutor derives his immunity, as well as his authority, from "the special nature of [the] responsibilities" delegated to him. The President, of course, is not only the appointing authority but also the official who delegated to the U.S. Attorney his authority, subject to constitutional and statutory limitations. So it is clear that a federal prosecutor is the agent of the President to carry out the President's duties. The language of Article II covers an almost infinite range of duties of the President. And it is not by any means confined to internal or domestic affairs. The term "the Laws" in Article

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

January 16, 1981

CHAMBERS OF
THE CHIEF JUSTICE

Re: No. 79-880, Kissinger v. Halperin

Dear Lewis:

Your January 16 recirculation, insofar as it recognizes absolute immunity for official acts of the President, is wholly satisfactory to me. I share John's view that the memorandum is particularly well wrought and I am in general agreement with most of it. I certainly would allow at least the immunities you allow, and I may well join in the entire memorandum. My own memorandum of January 15 will explain my views.

With respect to the issues other than the core question of Presidential immunity, I await other reactions. I have been of the view that the limited independent absolute immunity of Attorney General Mitchell and NSC Director Kissinger entitles them to summary judgment in this case and that we should so hold. The record does not support a claim that the Attorney General or Kissinger had any knowledge of or responsibility for unreasonable continuation of the tap. Those two officials -- particularly Kissinger, who prevailed on this issue in the district court -- have at least qualified immunity as a matter of law. Finally, as I have said before, I believe some derivative immunity applies to this case unless we are prepared to cut back on the immunity of aides to Members of Congress under Gravel.

Regards,

WEB

Justice Powell
Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

February 4, 1981

Re: No. 79-880 - Kissinger v. Halperin

Dear Bill:

I have your memo of today and a full Conference may well be useful. However, with the present "absentee rate" that will not be possible for at least ten days.

As soon as all hands are available, we can call another Conference.

Regards,

WEB

Justice Brennan

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

March 18, 1981

Re: No. 79-880, Kissinger v. Halperin

Dear Lewis:

I remain where I was on absolute immunity of a President. The head of the First Branch of the government must have absolute immunity comparable to that accorded the heads of the Second and Third Branches -- not to mention executive appointees of relatively low rank such as United States Attorneys. A notion that such appointees are absolutely immune -- derivatively -- but that the President from whom the immunity is derived is not immune would be mind-boggling.

If every President must set up "litigation reserves" (like a corporation under securities laws) -- or if he must wonder how often he will be sued after his term -- that sticks in my throat. The Iranian hostage rescue mission disaster is a recent example. That was an act of war, not authorized by Congress, and people were killed. If a civilian had gone along, would the President be liable to him?

With respect to your alternative drafts circulated today, I can live with either approach.

Regards,

WEB

Justice Powell

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 3, 1981

79-880 - Kissinger v. Halperin

MEMORANDUM TO THE CONFERENCE:

I would let the central issue come down as affirmed by an equally divided Court.

I see no useful purpose in reargument. We have exhausted the subject, the "gladiators" and those who had to read it all!

Regards,

WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

June 10, 1981

No. 79-880, Kissinger v. Halperin

Dear Lewis:

I agree with your draft per curiam opinion.

Regards,

WEB

Justice Powell

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 17, 1981

No. 79-880, Kissinger v. Halperin

Dear Lewis:

I agree with your June 16 draft per curiam opinion.

Regards,

WEB

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 28, 1981

RE: No. 79-880 Kissinger v. Halperin

Dear Byron:

I am very much in general agreement with the approach of your memorandum. I may have some suggestions as to specifics but I hope your approach commands a court.

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.

February 4, 1981

MEMORANDUM TO THE CONFERENCE

RE: No. 79-880 Kissinger v. Halperin

While I've already indicated my general agreement with Byron's memorandum in the above, John's memorandum circulated today prompts me to suggest that we ought have another full conference on this case.

W.J.B.Jr.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 16, 1981

RE: No. 79-880 Kissinger v. Halperin

Dear Lewis:

Your proposed Per Curiam in the above is satisfactory with me.

Sincerely,

Bill

Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 14, 1981

Re: No. 79-880, Kissinger v. Halperin

Dear Lewis,

Although your Memorandum rejects some of the views I expressed at our Conference discussion -- specifically, the concept of derivative absolute immunity -- I think I could subscribe to it if it became the opinion of the Court in this difficult case.

Sincerely yours,

P.S.

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 15, 1981

Re: No. 79-880, Kissinger v. Halperin

Dear Lewis,

It occurs to me that my note to you of January 13 may not have been entirely clear. In order to remove any possible doubt that it might have engendered, let me make clear that I agree generally with your Memorandum and hope that at least three others will, so that it can become an opinion of the Court. Specifically, I agree wholeheartedly with your proposed holding that the President has absolute immunity. My only real doubt goes to the question of whether or not at least some of the other petitioners may not have derivative absolute immunity, but I would be willing to be silent about that doubt, if my expression of it should endanger the chances of a Court opinion.

Sincerely yours,

P.S.

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

February 27, 1981

Re: No. 79-880, Kissenger v. Halperin

Dear Lewis,

This is in response to your Memorandum of February 26. While, as previously indicated to you, I substantially agreed with your original Memorandum concluding that a President enjoys absolute immunity, I would give favorable consideration to the view that there exists no Bivens-type cause of action whatever against a President of the United States.

Sincerely yours,

P.S.

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 11, 1981

Re: No. 79-880, Kissinger v. Halperin

Dear Thurgood,

I have read your Memorandum of today with interest. It seems to me that if, as clearly appears, a majority of the Court believes that a President of the United States has absolute immunity in a situation such as this, the Court should decide that important issue.

Sincerely yours,

P.S.

Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

April 10, 1981

Re: No. 79-880, Kissenger v. Halperin

Dear Lewis,

This is to confirm unambiguously my previous intimation that I would be glad to join either of your versions as an opinion of the Court. I would somewhat prefer the holding that there exists no Bivens-type cause of action against a President of the United States.

Sincerely yours,

P.S.

Justice Powell

Copies to the Conference

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

Fill

CHAMBERS OF
JUSTICE POTTER STEWART

June 2, 1981

Re: No. 79-880, Kissinger v. Halperin

Dear Lewis,

Your proposed Memorandum to the Conference and its enclosure seem quite satisfactory to me. I would, of course, be interested in knowing John's reactions.

Sincerely yours,

P.S.

Justice Powell

Copy to Justice Stevens

J PS approves also.

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 16, 1981

Re: No. 79-880, Kissinger v. Halperin

Dear Lewis,

Your proposed per curiam appears to me accurately to embody the views expressed at our last Conference and to be satisfactory in form.

Sincerely yours,

P.S.

Justice Powell

Copies to the Conference

Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

No. 79-880 - Kissinger v. Halperin

From: Mr. Justice White

Circulated: 23 JAN 1981

Recirculated: _____

Memorandum of JUSTICE WHITE.

I approach this case a good deal differently than do Lewis and those who agree with most or all of his submission.

This memorandum first reviews the posture of this case as it comes to us. It then deals with the wiretap statute, concluding that while Title III does not disturb the President's constitutional authority, whatever that may be, to wiretap without a warrant in national security situations, it does declare illegal and provide a remedy for any warrantless interceptions for which the Constitution requires a magistrate's prior approval, as well as for any unreasonable wiretaps whether or not the Constitution requires a warrant. Hence, Title III affords a remedy at least as broad as that afforded by an implied Bivens cause of action for a Fourth Amendment violation. Therefore, the latter cause of action need not be pursued in this case. This seems to me by far the most sensible reading of Title III and its legislative history.

It is then submitted that because this is primarily a Title III case, there is no necessity or occasion to address the President's immunity from damages in a Bivens case. The immunity question, if there is one before us, is whether the President and his aides are immune from Title III liability. The petitioners concede they did not bring that issue here, although they do not by any means concede that the President would not be immune from congressionally created remedies such as those contained in Title

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: 28 JAN 1981

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES:

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-880

Henry Kissinger et al., Petitioners,
v.
Morton Halperin et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February —, 1981]

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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

_pp. 7-12, 22, 23, 27-28, 32-37 & stylistic; footnotes renumbered

From: Mr. Justice White

Circulated: _____

2nd DRAFT

Recirculated: 23 FEB 81

SUPREME COURT OF THE UNITED STATES

No. 79-880

Henry Kissinger et al., Petitioners, *v.* Morton Halperin et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February —, 1981]

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pp. 8-12, 20-21, 36
-Footnotes 10-27 renumbered

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: 12 MAR 198-

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-880

Henry Kissinger et al., Petitioners, *v.* Morton Halperin et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February —, 1981]

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 19, 1981

Re: 79-880 - Kissinger v. Halperin

Dear Lewis,

I have not yet studied carefully your most recent circulations, but I shall have something to say about them--or rather about the one that you eventually choose to publish.

The more I get into this case the more I think that the majority is on a most mistaken course that will disserve the law and the country. Perhaps the United States should be more governable than it is, but I doubt very much that making the President absolutely immune when he injures persons by conduct that he knows is violative of the Constitution will contribute much of anything to this goal. Furthermore, if the majority really means what it says, it should also hold that statutory remedies for statutory violations are inoperative against the President and that he should be able to disregard his statutory duties with impunity, the antithesis of his oath faithfully to execute the laws. He would also be immune from injunctive suits, which may be as disruptive as damage suits. The separation of powers thesis underlying your absolute immunity holding could lead to these results.

Denying remedies across the board for Presidential violations of known constitutional and statutory duties seems to me gross overkill. If that result must follow from our past holdings with respect to judges and prosecutors, I would much rather withdraw from those decisions. But quite different from the Chief Justice, whose approach I find most unpersuasive, this result does not follow from our cases. To the extent that the President is performing prosecutorial or judicial duties or to the extent that functions are nonjusticiably allocated to him under the Constitution, he

should be immune. There may be other functions of his that also require absolute immunity, but it is a demonstrable non sequitur to conclude that the President should be unanswerable to anyone when in purporting to perform any of his official duties he deliberately refuses to abide by the law.

As you know, at the very least, I would sustain statutory remedies against the President for his known disregard of his statutory duties, and on this basis I would turn this case on Title III. Of course, this is a stale story.

As I say, it will be a while.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 9, 1981

Memorandum to the Conference

Re: No. 79-880, Kissinger v. Halperin

The two attached drafts were prepared in response to Justice Powell's 5th draft of version I and his first draft of version II. I do not, however, anticipate that I will have more than a few formal changes to make in response to his latest circulation (drafts six and two). I have attached a full version of my latest draft of what is now my version I. The other attachment is new; it would be substituted for section V (the other sections remaining substantially the same), if Justice Powell's version II is published.

BRW

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

pp. 32-36, 38 & stylistic

From: Mr. Justice White

Circulated: _____

4th DRAFT (Version I) Recirculated: 9 APR 1981

SUPREME COURT OF THE UNITED STATES

No. 79-880

Henry Kissinger et al., Petitioners,
v.
Morton Halperin et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February —, 1981]

Memorandum of JUSTICE WHITE.

I approach this case a good deal differently than do Lewis and those who agree with most or all of his submission.

This memorandum first reviews the posture of this case as it comes to us. It then deals with the wiretap statute, concluding that while Title III does not disturb the President's constitutional authority, whatever that may be, to wiretap without a warrant in national security situations, it does declare illegal and provide a remedy for any warrantless interceptions for which the Constitution requires a magistrate's prior approval, as well as for any unreasonable wiretaps whether or not the Constitution requires a warrant. Hence, Title III affords a remedy at least as broad as that afforded by an implied *Bivens* cause of action for a Fourth Amendment violation. Therefore, the latter cause of action need not be pursued in this case. This seems to me by far the most sensible reading of Title III and its legislative history.

It is then submitted that because this is primarily a Title III case, there is no necessity or occasion to address the President's immunity from damages in a *Bivens* case. The immunity question, if there is one before us, is whether the President and his aides are immune from Title III liability.

Possibly answer

*
✓ 2
5
✓ 29
✓ 30 ("mixed views")
✓ 31 (Jefferson)
✓ 32 (answer this) 1st DRAFT (Version II)
✓ 34 (function/status)
✓ 35 (4 judges)

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: 9 APR 1981

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 79-880

Henry Kissinger et al., Petitioners,
v.
Morton Halperin et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[April —, 1981]

Memorandum of JUSTICE WHITE.

I approach this case a good deal differently than do Lewis and those who agree with most or all of his submission.

This memorandum first reviews the posture of this case as it comes to us. It then deals with the wiretap statute, concluding that while Title III does not disturb the President's constitutional authority, whatever that may be, to wiretap without a warrant in national security situations, it does declare illegal and provide a remedy for any warrantless interceptions for which the Constitution requires a magistrate's prior approval, as well as for any unreasonable wiretaps whether or not the Constitution requires a warrant. Hence, Title III affords a remedy at least as broad as that afforded by an implied *Bivens* cause of action for a Fourth Amendment violation. Therefore, the latter cause of action need not be pursued in this case. This seems to me by far the most sensible reading of Title III and its legislative history.

Title III's remedy is as broad as Bivens. Thus no need to consider Bivens remedy.

It is then submitted that because this is primarily a Title III case, there is no necessity or occasion to address the President's immunity from damages in a *Bivens* case. The immunity question, if there is one before us, is whether the President and his aides are immune from Title III liability.

(1) no one viewed case this way until BRW — not DC, CADC, SG or any of parties

The immunity issue may under Title III

pp: 1,7,13,29-30,33-34,38,39
& stylistic

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: 5/28/81

2d DRAFT (Version II)

SUPREME COURT OF THE UNITED STATES

No. 79-880

Henry Kissinger et al., Petitioners, *v.* Morton Halperin et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[April —, 1981]

Memorandum of JUSTICE WHITE.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 16, 1981

Re: 79-880 - Kissinger v. Halperin

Dear Lewis,

I shall not dissent from your proposed per curiam disposition of this case.

Sincerely yours,

Byron

Justice Powell

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 22, 1981

Re: No. 79-880 - Kissinger v. Halperin

Dear Lewis:

As you know, my view at Conference was that although the President probably does enjoy absolute immunity from civil damages for his official conduct, his aides are not entitled to a similar shield. My reading of the history suggests that nothing about presidential immunity from suit was mentioned in the Constitution simply because the Framers took it as a given. On the other hand, we have been directed to nothing in the Constitution or in the debates that suggests that the Framers intended that individuals with national security responsibilities are to enjoy greater protection against civil damage actions than the qualified immunity to which other high government officials are entitled. Consequently, I would be unable to join an opinion along the lines of your memorandum. I will wait and see what others may write before coming to rest, and if no one else expresses my precise views, I may try my hand at a separate opinion.

Sincerely,

T.M.

Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 11, 1981

Re: No. 79-880 - Kissinger v. Halperin

Memorandum to the Conference

I have hesitated to add anything to the flurry of paper circulated in this case because I have been continuing what has proved a difficult struggle with the issues presented. But because everyone else is more or less "on record," the time seems ripe to set forth in a brief manner some of my own thoughts.

On the issue of presidential immunity from civil liability for official conduct, I remain about where I was at conference and in my earlier memorandum in this case. I do not believe that respondents can pursue this action for damages against petitioner Nixon. This position is, as I have said, based on my reading of the debates in the Constitutional Convention and contemporaneous writings. It is because of this history--and not because of any functional analysis--that I tend to believe that the President is immune from damages. Consequently, I would reverse the Court of Appeals in so far as it rejected petitioner Nixon's claim of absolute immunity.

On the other hand, I remain unconvinced that his aides are entitled to absolute immunity either due to their particular roles or as a derivation of the immunity that attaches to the President himself. I find nothing in the debates to convince me that presidential aides and employees of the Executive Branch were viewed by the Convention as enjoying special protection or meriting unusual sanctions. I also remain unconvinced that either their particular

responsibilities or the claim that they were "just following orders" entitles them to special protection. I would affirm the judgment of the Court of Appeals in so far as it held the aides entitled to only a qualified immunity.

I recognize that I am alone in these views and will if necessary write an opinion embodying them. But the Court is already fragmented in this case, and I hesitate to add to the problem. In cases of this nature, it is, I think, important that we achieve unanimity, or something as near to it as possible. With this in mind, I propose a compromise through which we might avoid altogether deciding in this case what is, to me, the most difficult issue--whether the President is absolutely immune. We might instead hold that there is no need to reach that question because on the facts of this case, petitioner Nixon is entitled to immunity as a matter of law. The trial court imposed liability on Nixon only for failing to place "temporal or informational limits on the surveillance" of respondents. Pet. App. 73a. I do not view that as sufficient participation in the activities alleged by respondents to have violated their constitutional rights to merit a conclusion that he was not acting in good faith.

The same cannot be said of the actions of the other petitioners. These actions, in my view, present a question as to reasonableness sufficient to require a trial. By my count, we are equally divided as to how to treat the President's aides, and this disposition could accordingly have the effect of affirming as to them by an equally divided Court. We would in effect be saving that question for a case in which all nine of us could participate.

It may be that this proposed compromise is at once too limited for some and too ambitious for others. I am not at all tied to it and am willing if necessary to write an opinion expressing my own views on immunity as I have described them. In the meanwhile, I would be interested to hear what others may think.

Sincerely,

T.M.

T.M.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 27, 1981

No. 79-880 -- Kissinger v. Halperin

MEMORANDUM TO THE CONFERENCE

I agree with Lewis that as time is running short, we should try to move this case along. I would rather decide it this Term than put if over for reargument, but I would also join a majority to consolidate it with Nixon v. Fitzgerald and Harlow v. Fitzgerald for reargument. Because I am the only "outstanding" vote in the case, I will try to respond to Lewis's outline of the status of the case with an outline of my own status on the various issues involved.

As all of you are aware, I have found the issues presented by this case enormously difficult and have been quite tentative in my earlier statements. But I have now completed my review of historical evidence, and I have altered my views somewhat on presidential immunity. I have now concluded that there are some circumstances in which imposition of civil damages liability against the President would be proper. For example, the President should enjoy no special immunity when he has acted outside of his authority. In that respect, his immunity would be similar to that enjoyed by a judge. The plaintiff might have difficulty demonstrating that the President has acted without authority, but that simply means that frivolous suits will be dismissed. Nevertheless, there may well be cases in which the President has acted outside of his authority and has violated an individual's constitutional rights as well. I am no longer persuaded that absolute immunity from damages liability would be consistent with the will of the Framers in such situations. I therefore will not be able to join Lewis's memorandum concluding that no Bivens-type action lies against the President.

I would be prepared to join an opinion concluding that all executive officials enjoy a form of qualified immunity, but that

that phrase does not mean the same thing in every case. The scope of an official's immunity should be determined by a balancing test weighing such factors as the range of his duties, the breadth of his discretion, and other circumstances that would necessarily vary from case to case. I do not believe that any other approach would properly resolve the conflicts between the competing interests present in every case involving a claim of immunity.

I would join a majority to grant reargument because I am a little concerned that no disposition resulting from the case's current posture would offer much guidance to the lower federal courts. On reargument, the parties might be invited to address the limits of the kinds of immunity to which they believe the President and his aides are entitled. In addition, it would seem at least a bit odd for us to bring this case down and immediately set for argument one or both of the Harlow cases, neither of which raises any issues not present here. Yet unless we can dispose of Kissinger in a manner offering some guidance to the lower courts, granting, vacating, and remanding one or both of the Harlow cases would appear to have little point.

Sincerely,

T.M.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 17, 1981

Re: No. 79-880 - Kissinger v. Halperin

Dear Lewis:

Your proposed Per Curiam is OK with me.

Sincerely,

T.M.

Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 9, 1981

Re: No. 79-880 - Kissinger v. Halperin

Dear Byron and Lewis:

I have delayed too long in getting back to you in this important and complicated case. One reason for my delay is the importance of the issue. Another is the excellence of the analytical work each of you has presented. Still another was the fact that I wanted to see the later responsive drafts from your respective chambers. And there was the concern that, with Bill Rehnquist "out," the Court might wind up with a vote for the most part evenly divided. Bill's partial dissent in Butz v. Economou exacerbates this concern in the context of future cases.

With the pressure of the February session behind us, I was able over the weekend to return to this case and to devote full attention to it. I have concluded that, in line with my vote at conference, I am in sympathy with Byron's more narrow approach. I have distinct reservations about broad absolute immunity for the President, and I am persuaded that, despite Lewis' strong memorandum, Byron's analysis is the proper one. Nothing is to be gained by my going into specifics at this point before the votes have finally jelled.

Sincerely,

Harry

Mr. Justice White
Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 23, 1981

Re: No. 79-880 - Kissinger v. Halperin

Dear Lewis:

This is merely to let you know that I am in agreement with the observation, at the top of page 2 of your memorandum of March 18 to the Conference, that we may not "properly avoid writing and simply affirm CADC by 4 to 4 with respect to" the three petitioners other than the President.

Sincerely,

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 17, 1981

Re: No. 79-880 - Kissinger v. Halperin

Dear Lewis:

The proposed per curiam appears to me to be in accord with the discussion at our last conference. Its form is satisfactory with me.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

December 17, 1980

No. 79-~~800~~ 880 Kissinger v. Halperin

Dear Potter and John:

Following our discussion yesterday, I dictated the enclosed memorandum with the hope of recording generally the substance of my understanding as to the views expressed.

It may be that I have done some "editorializing" - as distinguished from wholly objective reporting - but I hope you will think it is a generally fair summary.

I would appreciate your advice as to whether the memorandum is close enough to what you might be willing to accept for me to do a draft along the lines set forth therein. I understand, of course, that none of us is committed to anything except to try to find enough common ground for an opinion on some of the issues.

Sincerely,

Mr. Justice Stewart
Mr. Justice Stevens

LFP/lab

Enclosure

January 7, 1981

79-880 Kissinger v. Halperin

Dear Potter and John:

Here is the text of the memorandum I was assigned to write in this case.

I have tried to adhere closely to my understanding of the rough consensus that we developed in our discussions of this case. I had a subsequent brief discussion with Thurgood, who indicated that he probably would go along with us on absolute immunity for the President. The Chief, when he assigned the memorandum, was quite positive about absolute immunity for the President and I think he would favor similar derivative immunity. As you will observe, however, I accepted your negative view on derivative immunity and became persuaded myself that Mitchell and Kissinger had absolute immunity with respect to their national security functions. My understanding is that this is in accord with your tentative thinking.

The most difficult part of the case, at least for me, is to identify what is open for review on remand. The inexpliciable failure of the SG to petition for certiorari on the Title III statutory issue creates the complication. I believe, however, that I have this worked out satisfactorily.

In sum, if the three of us can remain together, and unless Thurgood changes his tentative view, we will have a Court on presidential immunity, and at least a plurality on the status of Kissinger and Mitchell.

Although I am putting this draft in the hands of the printer so that he can get started on it, I will, of course, welcome your suggestions. I am grateful for your help.

Sincerely,

Mr. Justice Stewart
Mr. Justice Stevens

lfp/ss

1-9-81

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

1st DRAFT

From: Mr. Justice Powell

SUPREME COURT OF THE UNITED STATES

Circulated: JAN 10 1981

No. 79-880

Recirculated: _____

Henry Kissinger et al., Petitioners, v. Morton Halperin et al. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[~~September~~ January —, 1981]

Memorandum of JUSTICE POWELL.

In this case involving a warrantless wiretap placed on the telephone of a staff member of the National Security Council (NSC), we are faced with issues regarding the scope of the immunity from damage suits possessed by the President of the United States and his senior aides.[1] The central question is whether the Court of Appeals for the District of Columbia Circuit was correct in according petitioners an immunity conditioned on a showing of "good faith," rather than a more absolute immunity that is unrelated to their subjective intentions and the objective reasonableness of their interpretations of the controlling law.

I

During the early part of 1969, President Richard Nixon and his close associates were faced with a number of apparent "leaks" to the press of sensitive information concerning national security matters.[2] In their view, these leaks pre-

[1] Petitioners here are former President Richard Nixon, former Attorney General John Mitchell, former National Security Advisor (later Secretary of State) Henry Kissinger, and former Presidential aide H. R. Haldeman.

[2] These leaks included several involving the administration's policies relating to the war in Vietnam. In addition, there were leaks concerning the strategic arms limitation talks with the Soviet Union, and other sensi-

pgs 8, 9, 20, 21, 31
plus Stylistic Changes Throughout.

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

From: Mr. Justice Powell

1-15-81

Circulated: _____

Recirculated: JAN 16 1981

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-880

Henry Kissinger et al., Petitioners, v. Morton Halperin et al. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January —, 1981]

Memorandum of JUSTICE POWELL.

In this case involving a warrantless wiretap placed on the telephone of a staff member of the National Security Council (NSC), we are faced with issues regarding the scope of the immunity from suits for damages possessed by the President of the United States and his senior aides.[1] The central question is whether the Court of Appeals for the District of Columbia Circuit was correct in according petitioners an immunity conditioned on a showing of "good faith," rather than a more absolute immunity that is unrelated to their subjective intentions and the objective reasonableness of their interpretations of the controlling law.

I

During the early part of 1969, President Richard Nixon and his close associates were faced with a number of apparent unauthorized disclosures to the press of sensitive information concerning national security matters.[2] In their view, these

[1] Petitioners here are former President Richard Nixon, former Attorney General John Mitchell, former National Security Advisor (later Secretary of State) Henry Kissinger, and former Presidential aide H. R. Haldeman.

[2] These leaks included several involving the administration's policies relating to the war in Vietnam. In addition, there were leaks concerning the strategic arms limitation talks with the Soviet Union, and other sensi-

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 24, 1981

79-880 Kissinger v. Halperin

MEMORANDUM TO THE CONFERENCE:

I will, of course, have a few observations to make about Byron's memorandum of January 23.

L.F.P.

L.F.P., Jr.

ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 4, 1981

No. 79-880, Kissinger v. Halperin

MEMORANDUM TO THE CONFERENCE

I thought it would be helpful to circulate a preliminary response to John's memorandum in this case. While I think that some of John's ideas are useful--and plan to incorporate them in my next circulation of a draft--my basic conclusion is that we cannot avoid the question of immunity from damages based on constitutional violations in this case.

First, although I did not use the word "preempt," I agree with John that Title III may be viewed as preempting a Bivens action based on the Fourth Amendment, but only for wiretaps that are made illegal under Title III. There is, I think, little difference between saying there is preemption as to these wiretaps and my view that the Court need not reach any constitutional issues wherever it is clear that constitutional liability will merely duplicate statutory liability. See my memo, § IV, D. I am happy, however, to rely to some degree on a preemption approach as to Title III taps in the next draft.

The key question here is what we should do with the possible liability of petitioners for constitutional violations that are not preempted by Title III--i.e., acts that violate the Fourth Amendment but are exempt from the statute because of § 2511(3). Byron argues, I believe incorrectly, that we can avoid the question of petitioners' immunity from this kind of claim by concluding that the statute incorporated the proscriptions of the Fourth Amendment, even in the national security area.

John, as I understand his memorandum, takes a different view from Byron. After stating that constitutional challenges to taps covered by Title III are preempted, he argues that "there would remain ... a claim for damages based on non-Title III taps." He advances several reasons why petitioners nevertheless should not be

held liable under the Constitution, and we therefore need not reach the absolute immunity issue. If I understand them correctly, I have difficulty with all of these reasons but not all of John's conclusions.

First, John argues that by adopting § 2511(3) Congress has "implicitly approved of the reasonableness" of these taps. Memo. p. 3. In view of our decision in Keith, we certainly cannot rely on implicit congressional approval of national security wiretaps of any scope or duration. In Keith we explicitly said: "[N]othing in § 2511(3) was intended to expand or to contract or to define whatever presidential surveillance powers existed in matters affecting the national security." 407 U.S., at 308. Moreover, Congress hardly could have intended to limit the protection of the Fourth Amendment. Even if a wiretap retained a national security purpose, as petitioners argue in this case, thus exempting it from Title III, it can become unreasonable in scope and duration and thereby violate the Fourth Amendment.

"Even apart from congressional approval", John apparently also would conclude that these wiretaps were "reasonable within the Fourth Amendment." Memo. p. 3. But this is a factual conclusion that contradicts the explicit holdings of two lower courts. Perhaps John is saying that the wiretap was reasonable for the period of time that it remained a national security wiretap and only became unreasonable during a later period when it was a "political" wiretap. If so, he may be arguing that the only possible constitutional claims relate to a period of time when the wiretap was also illegal under Title III (because it was "political") and are therefore preempted. But this view ignores the fact that the wiretap may have retained a national security purpose throughout much or all of its life. If it did so, then petitioners may well have violated the constitutional reasonableness requirement without violating Title III.

Finally, John expresses the view that at least Nixon, Mitchell and Kissinger have absolute immunity. Thus, John - by a different line of reasoning from mine - reaches the immunity issues.

Insofar as John would find absolute immunity for three of the petitioners, his "bottom line" is not substantially different from mine except as to the period of such immunity. He and I both (i) would not reach

constitutional claims that duplicate statutory ones, (ii) would reject other constitutional claims against Nixon, Mitchell and Kissinger where absolute immunity exists, and (iii) would not decide the difficult question whether Congress may impose statutory damage-suit liability on the President. But to the extent that John prefers to avoid the absolute immunity question altogether by finding this unreasonable wiretap to be constitutional or by finding Title III qualified immunity on these facts, I find his approach unacceptable.

In all candor, I am puzzled by the apparent interest in avoiding the immunity questions with respect to constitutional violations that prompted us to take this case. These are the principal issues decided by the courts below, and the only issues briefed and argued by the parties. Of course, if indeed Congress intended a total preemption by Title III of all federal remedies - statutory and constitutional - that might dispose of this case. But for reasons I am stating at some length in the next draft of my memorandum, it is extremely doubtful whether Congress has the power - in view of the doctrine of separation of powers - to impose any damage remedy on the President. Congress gave no hint that it intended to exercise such a power in adopting Title III, even if it exists.

Respondents instituted this suit in 1973. This litigation now has continued for nearly eight years. It is a case of very considerable national importance, and certainly the parties are entitled to have it brought to a conclusion. To be sure, these considerations would not justify an unsound conclusion. There is, however, every reason to believe that if we remand the case now, and avoid the basic issues presented here, these same issues will again be back here in two or three years. I have no reason to think that we shall be more enlighted then than we are at present.

As John is away, I am not able to clarify my uncertainty as to exactly what he now suggests. It may well be that I misread his memorandum.

Sincerely,

LFP/lab

Lewis

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 5, 1981

79-880 Kissinger v. Halperin

MEMORANDUM TO THE CONFERENCE:

I deliver to you herewith a third draft of my memorandum in this case.

The changes, for the most part, were prompted by Byron's memorandum. This draft does not include any changes that I may wish to make in light of John's recent comments.

L.F.P.

L.F.P., Jr.

ss

1, 10, 11-13, 14-22, 24-25, 29, 31, 33
plus stylistic changes throughout

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

2-5-81

From: Mr. Justice Powell

3rd DRAFT

Circulated: FEB 5 1981

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 79-880

Henry Kissinger et al., Petitioners, v. Morton Halperin et al. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January —, 1981]

Memorandum of JUSTICE POWELL.

In this case involving a warrantless wiretap placed on the telephone of a staff member of the National Security Council (NSC), we are faced with issues regarding the scope of the immunity from suits for damages possessed by the President of the United States and his senior aides.[1] The central question is whether the Court of Appeals for the District of Columbia Circuit was correct in according petitioners an immunity conditioned on a showing of "good faith," rather than a more absolute immunity that is unrelated to their subjective intentions and the objective reasonableness of their interpretations of the controlling law.

I

During the early part of 1969, President Richard Nixon and his close associates were faced with a number of unauthorized disclosures to the press of sensitive information concerning national security matters.[2] In their view, these

[1] Petitioners here are former President Richard Nixon, former Attorney General John Mitchell, former National Security Adviser (later Secretary of State) Henry Kissinger, and former Presidential aide H. R. Haldeman.

[2] These leaks included several involving the administration's policies relating to the war in Vietnam. In addition, there were leaks concerning the strategic arms limitation talks with the Soviet Union, and other sensi-

Re: 79-880 Kennedy

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

Feb. 5 '81

Dear Thurgood.

In my 3rd Draft, circulated this afternoon, I have tried to meet your view — as I understand it — that the absolute immunity of a President is constitutionally based.*

See my revision of Part III, sub-parts B & C.

Sincerely,

Lewis

* I agree with you.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 5, 1981

79-880 Kissinger v. Halperin

Dear Chief:

Although I will, of course, be happy to attend any Conference for the purpose of further discussion of this case, I must say in candor that I doubt the utility of the generalized discussion that in all likelihood will ensue.

This is a complex case that does not readily lend itself to useful discussion among nine lawyers. The issues have been ventilated at considerable length in the several memoranda already circulated. Moreover, I am by no means certain that John and I are irrevocably too far apart to get back together.

Having said all of this, I expect to remain in Washington - and to be present every day at the Court (except Sunday) - until the resumption of arguments on ~~January~~ February 23. And so I am readily available to confer.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

Februrary 12, 1980

Kissinger

Dear John:

I share some further thoughts with you on the question of possible congressional preemption of petitioners' Bivens remedy in this case. In my memorandum to the Conference of February 4, I accepted the idea that Title III may be viewed as having "preempted" any constitutional damages action that is merely duplicative of the statutory damage remedy. Although I am not entirely sure, I do not read your memorandum as suggesting more than this. Thus, constitutional damage claims that may not be brought under Title III are not preempted.

I have taken a look at Bivens, which I had not read in some time. It left open the possibility of a congressional determination that a damage remedy against federal officials for constitutional violations is inappropriate. The majority opinion recognized an inherent power of the federal courts to formulate appropriate remedies, but emphasized that "we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." 403 U.S., at 397. Certainly, however, there are limits on the power of Congress to legislate with respect to remedies for constitutional violations. Otherwise, Congress could render meaningless - or substantially dilute the force of any provision of the Bill of Rights.

In any event, for present purposes, I can assume that Congress has the power to provide a statutory damage remedy for certain illegal wiretaps and preempt all Bivens claims involving wiretaps, even those not covered by the statutory remedy. Fortunately, we need not decide whether Congress has such a power, because Congress has not attempted to exercise it in this case. There is no

indication at all that Congress intended, in Title III, to "preempt" the entire field of damage remedies for illegal wiretaps. It provided a statutory damage remedy for the vast majority of unconstitutional wiretaps by making those illegal under the statute and providing for damage suits. It did not rule out Bivens actions under the Fourth Amendment for wiretaps exempted from the statute. As I think is clear from §2511(3), and as we held explicitly in Keith, Congress simply did not legislate with respect to national security wiretaps.

Bill's preemption analysis in Milwaukee v. Illinois, even if fully applicable to a case involving constitutional rights, does not lead to an opposite conclusion. He views the question as whether Congress has "spoken directly" concerning a particular aspect of federal common law. Op. at 9. He then goes on to emphasize the comprehensive nature of the statute under consideration. Id. at 10-11. Congress certainly has not spoken directly to the question of Bivens suits based on national security wiretaps falling outside Title III, and because of the national security exemptions in § 2511(3), Title III is in no sense "comprehensive." In allowing a Bivens remedy for unconstitutional national security wiretaps we would thus be "'filling a gap,'" id. at 17 n.16, that Congress left open quite deliberately.

In sum, the argument that Title III preempts all Bivens suits, even where there is no statutory remedy, must be treated exactly as a similar argument was treated in Davis v. Passman, 442 U.S. 228 (1979). There, it was argued that Title VII preempted a Bivens remedy against Congressmen for sex discrimination even though the statute exempted Congressmen from statutory liability, id. at 246-47. Congress had not, however, indicated an affirmative intent to preempt other remedies under the Fifth Amendment. It had merely left the question open. The Court therefore held that congressional employees retain a Bivens remedy under the Fifth Amendment, even though other federal employees may only sue under Title VII (under Brown v. GSA, 425 U.S. 820 (1976)).

Because I do not believe that Congress meant to preempt a Bivens suit based on wiretaps falling outside the scope of Title III, I continue to believe that we must reach the question of petititioners' immunity from constitutional damage suits in this case.

As I indicated in my earlier memorandum, the desirability of reading Title III this way is emphasized by the difficulty of the question Byron reaches - whether Congress has the power to legislate comprehensively with respect to the President and especially his immunity.

Sincerely,

Mr. Justice Stevens

lfp/ss

cc: Mr. Justice Stewart

February 23, 1981

78-880 Kissinger

Dear Potter and John:

In view of John's suggestion at Friday's Conference, and the resulting expressions of some interest in whether a Bivens action may be be brought against the President, I have done a good deal of thinking over the weekend.

I would have no difficulty holding that no Bivens action lies against a President. See my dissent in Davis v. Passman, 442 U.S. 228 (1979). My view also remains firm that we are on sound ground in holding that a President has absolute immunity from damage suit liability. Since only the immunity issue was argued or considered below, and in view of the generally favorable attitude of our Brothers towards Bivens suits, I have thought that there was a greater likelihood of obtaining a Court on the absolute immunity rationale.

I suppose it is more logical, however, for the reasons stated by both of you at Conference, to address the Bivens issue first. If there can be no suit resulting in liability, one does not reach the immunity issue.

Accordingly, with more than a little assistance from my clerk Paul Smith, I have tried to outline an alternative memorandum that at least would give the Brothers a choice. Indeed, unless I have overlooked something, I would prefer the Bivens approach with respect to the President if there is substantial sentiment for it.

But, I do not think Byron's position would change as he would hold that Congress has the power to impose a damage remedy, and has exercised it in Title III to a degree that supersedes all claims directly under the Constitution involving wiretaps. I doubt that Bill Brennan would be

any more inclined to accept our Bivens view than he would absolute immunity. I also rather doubt that Thurgood would prefer the Bivens analysis, although his only comment at Conference was that he was now "more uncertain" than ever.

In any event, I would like your judgment as to (i) whether it is desirable to circulate what in effect would be an alternative memorandum, and (ii) whether the enclosed outline generally has your approval.

If your responses are affirmative, I will proceed as promptly as I can with the alternative.

Again, my thanks to you both for your generous assistance.

Sincerely,

Mr. Justice Stewart
Mr. Justice Stevens

lfp/ss

2/23/81

To: Potter and John

From: Lewis

Re: No. 79-880: Kissinger v. Halperin, and Possible Revisions Emphasizing a Bivens Approach

As I understand John's suggestion, our memorandum in this case could be modified to shield the President from constitutional damages suits by holding that there is no Bivens action against the President. This ruling would replace the present holding that the President is absolutely immune from liability based on any official acts.

If the Court adopts this Bivens approach, we would simply be developing the contours of the federal common law damage remedy for constitutional violations first recognized in Bivens. In so doing, the Court could place reliance on the fact that the Bivens decision itself stated: "The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress." 403 U.S., at 396. Here, there are numerous "special factors" that counsel hesitation before the judicial branch, on its own initiative, decides to impose a damage remedy on the person of the President, who embodies the executive branch.

Indeed, because the most recent draft relies principally on nonprudential constitutional considerations

to support the absolute immunity of the President, it would be relatively easy to recast it along these lines. The same considerations support reluctance to impose a Bivens remedy on the President. The opinion presently refers to the fact that courts have been reluctant to issue orders to the President himself, and adds that noted constitutional scholars believe a sitting President cannot be tried criminally. It would simply be necessary to emphasize more strongly the separation-of-powers aspects of the issue, explaining the unseemliness and inherent dangers of a contrary holding. Of course, the opinion should continue to point out the existing remedies and pressures that serve to contrain presidential lawlessness.

Specifically, the draft could be reorganized along the following lines:

Part I. This section, summarizing the facts, would need no significant changes.

Part II. This section, summarizing the precedents in the area of official immunity, would be moved to a later location, after the discussion of the President and prior to the discussion of the immunity of the other petitioners.

Part III. At present, this section deals with the President. It would be altered to contain the Bivens

argument, and would become the second section of the opinion.

Subpart A. This section addresses Byron's argument that all possible constitutional claims against the petitioners are subsumed in the statutory cause of action under Title III. If Byron adheres to this view, it would still be necessary to begin with this issue, in order to make clear why the Court is presented with the question whether the petitioners are subject to suit directly under the Fourth Amendment.

Subpart B. In this section, the discussion of the prudential reasons for immunizing the President, derived in part from Scheuer v. Rhodes, 416 U.S. 232 (1974), would be replaced by a discussion of the special constitutional status of the President, based mainly on the analysis in what is now Subpart C. It would still be useful to analogize to the protections accorded to Congressmen under the Speech and Debate Clause. The historical assumptions of the founders, see p. 18, would also remain relevant to a more explicit separation-of-powers argument concerning the scope of the Bivens remedy. As noted above, I would also retain the references to the power of courts to enjoin or prosecute a President, see pp. 18-19, and the summary of existing remedies for unconstitutional presidential actions, see pp. 19-20. Finally, I would retain some subsidiary reliance on the practical reasons for concluding that

Presidents should not be sued for damages. These arguments, now in subpart B, seem relevant to a consideration of whether it makes sense to extend this common-law remedy to Presidents.

Subpart C. This section would be eliminated, with its analysis moved to the previous section.

Part IV. This section now discusses the scope of the immunity possessed by Mitchell, Kissinger and Haldeman. I would argue that a discussion of them should remain focussed on immunity. Implicit in Butz v. Economou is the conclusion that high executive officials can be sued under a Bivens theory. Insofar as one remains convinced that two of these officials (Kissinger and Mitchell) can be sued except for actions in the specific area of national security, it makes sense to base this line-drawing on a prudential, functional analysis, derived from previous immunity decisions. It would be more difficult, I think, to explain why a Bivens action is barred in the national security area. Certainly the separation-of-powers arguments made with respect to the President would only be marginally relevant.

In sum, I would retain Part IV substantially in its present form. It would, however, be necessary to introduce this section with the summary of immunity decisions that is now in Part II. It would also be necessary to revise subpart C, where the opinion rejects the

concept of derivative immunity based on the President's immunity. Instead, the issue would be whether the separation-of-powers requires courts to abstain from extending the Bivens remedy to actions done under presidential orders. The section probably should conclude that such abstention is unnecessary, perhaps analogizing to the fact that presidential subordinates may be enjoined, even when acting under presidential order. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). It would still be necessary to distinguish the Gravel case, which extended the protections of the Speech and Debate Clause to legislative aides.

* * *

A final question is the impact that such a decision would have on the separate question, discussed by Byron, of Congress's power to impose a damage remedy on the President. In my view, such a legislative action also would present a serious separation-of-powers question. Bivens itself acknowledges a role for Congress in deciding whether a damage remedy is appropriate in questionable situations, but this was not written in a context involving damages against the President. But I would leave this question open, either explicitly or implicitly.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 26, 1981

79-880 Kissinger

MEMORANDUM TO THE CONFERENCE:

At Friday's Conference the suggestion was made that a threshold question in this case, certainly with respect to the President, was whether an implied Bivens-type remedy lies at all.

In keeping with my view that the President is immune from damage-suit liability for actions taken in the exercise of Article II powers, I could agree - for reasons implied in Bivens itself - that no such action lies against a President. Indeed, as this is a threshold question of jurisdiction, I would prefer to address it, rather than relying on an immunity rationale.

I adhere, of course, to the view that if a Bivens damage suit remedy exists against a President, he is protected by absolute immunity, for the reasons stated in my memorandum. I wrote the memorandum on this theory as I understood there were five votes in favor of accepting the government's position on this issue. As of now, two Justices have indicated substantial agreement with this memorandum, with the Chief Justice also agreeing at least with respect to immunity for the President. In view of changes Byron recently circulated, I have made some clarifying changes in my circulation of February 5 and will recirculate it when the printer makes it available.

As indicated above, however, I am now inclined to revise the memorandum substantially to address the availability of a Bivens-type remedy. I would welcome hearing from other Justices as to whether they are interested in considering this approach.

L.F.P., Jr.

ss

February 27, 1981

79-880

Kissinger

Dear John:

This is a response to your recent letter--which I very much appreciate. My new circulation (4th Draft) moves towards your suggestions. For the reasons set forth below, I have not adopted those suggestions in full. But I am still open to further consideration.

In this draft, I have not changed the outcome with respect to Mitchell and Kissinger. As I understand your suggestion, you would not order a remand of the constitutional claims against them, because you read the record as showing that their only involvement in the tap was at the beginning, when their absolute immunity applies. As you suggest, the evidence linking Mitchell and Kissinger to the wiretap is strong at the beginning of the surveillance, when the purpose clearly was to protect national security. See Memorandum at n. 46. And, under our analysis, they are absolutely immune for acts undertaken with that purpose. I would, however, prefer that we not decide here that these two petitioners had no responsibility for the wiretap at a time when is may have become a "political" surveillance.

First, the present draft does not order further consideration of the constitutional claims against Kissinger and Mitchell on remand. Instead, it states that because of the scope of their absolute immunity for national security matters, any possible liability they may have under the Fourth Amendment must relate to a "political" surveillance and thus must duplicate statutory liability--since the statutory exemptions in § 2511(3) would not apply to a political wiretap. See Memorandum at 32-34, 36. The draft argues that these two petitioners, like Nixon, need only litigate the statutory claim in the District Court. Thus, if we were to go further, and find that Mitchell and Kissinger are exonerated from constitutional liability because they never participated in the wiretap after it

became political, the effect could be simply a comment on the evidence that the District Court will be considering with respect to Title III. Such a conclusion is not necessary to our decision in this case.

Moreover, I'm not sure that the record would warrant such a conclusion on our part. Although the memorandum states that the tap was initiated in order to stop leaks, it does not decide when, if ever, the purpose shifted to "political" concerns. Kissinger received regular summaries of the surveillance for a full year. See Memorandum at 3; 606 F.2d, at 1214. Moreover, on at least three occasions during 1969, Kissinger requested specifically that the tap on Halperin be continued, despite suggestions from the FBI that it be terminated as unproductive. Memorandum at 4, n. 11; 606 F.2d, at 1197. One such request occurred about five months after the tap was initiated, at about the time Halperin resigned officially from the NSC and long after he had stopped receiving substantial amounts of sensitive information. See 1 App. at 188. This last request from Kissinger singled out Halperin and one other subject, while requesting an end to a number of other taps.

This evidence suggests that Kissinger may well have had personal reasons for a surveillance on Halperin in which he showed some interest for a year. As a result, I tend to believe that it is best not to exonerate him on this record.

Similar reasoning applies to Mitchell. He approved the wiretap without following his own required procedures, and then received at least three summaries of the surveillance during the following year--on August 6, 1969, December 29, 1969, and May 4, 1970. 1 App. at 249, 264; 2 App. at 162. Moreover, the memoranda of the FBI in the suggest that he was fully informed about the various surveillances that were taking place, e.g., 1 App. at 188, but did not undertake any periodic review of them, as required by his own regulations. Especially in view of what the draft says about the Attorney General being the key person responsible for presidential national-security wiretaps, Memorandum at 24-26, this evidence arguably is sufficient to render Mitchell responsible for the wiretap, at least throughout its first year. The tap may well have lost its national-security purpose during that period of time.

I therefore would prefer to allow the District Court to determine whether Kissinger and Mitchell are implicated in a "political" surveillance and therefore liable under Title III. You will note, however, that I have altered the language at the end of Section IV A to require evidence of "active" involvement of Mitchell and Kissinger at a later stage. Especially in view of the fact that we can terminate separate consideration of the constitutional claims against them without deciding this question ourselves, I am concerned that we not be perceived as "reaching out" to exonerate these two petitioners. On the other hand, if you or other Justices feel strongly about reaching this question, I certainly would be willing to reconsider my position.

With respect to your suggestion concerning the preemptive effect of the Title III damage remedy, I have added language in note 52 of the opinion stating that there cannot be a recovery under the Constitution against Haldeman if that merely duplicates the statutory recovery. The note also states that respondents "cannot bring a Bivens suit for damages under the Constitution where Congress has provided a fully adequate alternate remedy." I think this language, combined with other statements in the opinion asserting that Title III is an exclusive remedy where it applies, should be sufficient to make the point. But I am open - of course - to consider any further thoughts after you have had a chance to review the 4th draft.

This is low priority now; so consider this only when it is not burdensome.

Sincerely,

Mr. Justice Stevens

lfp

cc: Mr. Justice Stewart

2-27-81

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-880

Henry Kissinger et al., Petitioners,
v.
Morton Halperin et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January —, 1981]

Memorandum of JUSTICE POWELL.

In this case involving a warrantless wiretap placed on the telephone of a staff member of the National Security Council (NSC), we are faced with issues regarding the scope of the immunity from suits for damages possessed by the President of the United States and his senior aides.[1] The central question is whether the Court of Appeals for the District of Columbia Circuit was correct in according petitioners an immunity conditioned on a showing of "good faith," rather than a more absolute immunity that is unrelated to their subjective intentions and the objective reasonableness of their interpretations of the controlling law.

I

During the early part of 1969, President Richard Nixon and his close associates were faced with a number of unauthorized disclosures to the press of sensitive information concerning national security matters.[2] In their view, these

[1] Petitioners here are former President Richard Nixon, former Attorney General John Mitchell, former National Security Adviser (later Secretary of State) Henry Kissinger, and former Presidential aide H. R. Haldeman.

[2] These leaks included several involving the administration's policies relating to the war in Vietnam In addition, there were leaks concerning the strategic arms limitation talks with the Soviet Union, and other sensi-

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 12, 1981

79-880 Kissinger v. Halperin

Dear Thurgood:

Your memorandum is constructive, and I believe will get this case off dead center.

I do not believe, however, that - on the record before us - we can avoid the issue of absolute presidential immunity by deciding that Nixon possesssed qualified immunity as a matter of law, or was not responsible for what appear to have been constitutional violations. As the District Court stated, "President Nixon authorized the wiretap program and assumed personal responsibility for its operation." Pet. App. 70a. He was "aware of the fact that no information was being obtained relating to leaks and that much nonpertinent information was being gathered," yet he "took no affirmative action to terminate the surveillance or to reduce its scope." Id., at 72a. During the final year of the tap, when its "political" nature became most apparent, summaries were sent only to the President's aide--Haldeman--and this change was made on the direct orders of Nixon himself, after a meeting on May 13, 1970, between the President and Director Hoover. 1 App. 205. In short, as the District Court concluded, Nixon was clearly responsible for initiating and for overseeing the wiretap during its duration., Pet. App. 73a. I see no way to exonerate him on this record.

Nor can I find any basis for a conclusion that Nixon has a good-faith defense as a matter of law. The District Court ruled that the violation of the constitutional reasonableness requirement could not have occurred in good faith. The Court of Appeals went even further: "there were no reasonable grounds for believing that the continuing surveillance was in accord with the Constitution, and the record contains ample support for the trial court's ruling on bad faith." In sum, if a Bivens suit lies against a President (see below), I think we must

decide the question of absolute Presidential immunity because it is presented squarely.

May the President Be Sued?

It would be desirable, as you suggest, if we could develop unanimity as to the President. The issue of presidential liability seems to me to be one of unusual importance. I hardly need say that I agree wholeheartedly with your view that a President should have absolute immunity from civil damage suit liability. This was the primary issue that we granted this case to decide, and five of the eight participating Justices think there should be absolute immunity. Even if the votes were the other way, it would be important for all concerned to know what the law is on a question that could vitally affect the functioning of the White House.

There remains, however, the Bivens issue, which could make it unneccessary to reach the question of Presidential immunity. Following our discussion of it, I have undertaken a revision of the portions of my memorandum dealing with presidential immunity, and expect to circulate it early next week. I conclude that certainly in the absence of any express authorization by the Congress, the judicial branch should not imply a damage suit cause of action against the President of the United States. In my view, a holding to this effect by all eight of us would be the preferred resolution of this case with respect to the President.

The Other Three Petitioners

With respect to the other three petitioners, you may be correct that the Court is evenly divided, but I am as yet unsure that this is the case. Byron would not reach the issue of these petitioners' immunity from constitutional suits. He does, however, record his disagreement with my view that Kissinger and Mitchell possess absolute immunity for national security actions. I am unclear on whether Bill Brennan and Harry meant to endorse these dicta, as well as his statutory argument.

* * *

Thurgood, I add one final observation. I agree with you that a functional analysis alone would not entitle a President to absolute immunity in the exercise of all of

his Article II duties, although I do think it would where he acts clearly in the interest of national security as was the situation when this tap was commenced. Every President since FDR has asserted constitutional authority to wiretap for this purpose.

I also agree with you that general presidential immunity derives from his unique role in our constitutional scheme, as supported by the unambiguous contemporaneous thinking at the time the Constitution was adopted.

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss

cc: The Conference

pp. 13-25 are substantially new.
Other changes indicated on
1, 6, 7, 9, 11, 13, 26, 28, 29,
30, 31, 33, 34, 35, 38

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

From: Mr. Justice Powell

3-17-81

Circulated: _____

Recirculated: MAR 17 1981

FIRST DRAFT (Version II) (Bivens)

SUPREME COURT OF THE UNITED STATES

No. 79-880

Henry Kissinger et al., Petitioners,
v.
Morton Halperin et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1981]

Memorandum of JUSTICE POWELL.

In this case involving a warrantless wiretap placed on the telephone of a staff member of the National Security Council (NSC), we are faced with various issues raised by suits for damages alleging constitutional violations by the President of the United States and his senior aides.[1] One question is whether a President can be sued for damages in such a case. Another is whether the Court of Appeals for the District of Columbia Circuit was correct in according petitioners an immunity conditioned on a showing of "good faith," rather than a more absolute immunity that is unrelated to their subjective intentions and the objective reasonableness of their interpretations of the controlling law.

I

During the early part of 1969, President Richard Nixon and his close associates were faced with a number of unauthorized disclosures to the press of sensitive information concerning national security matters.[2] In their view, these

[1] Petitioners here are former President Richard Nixon, former Attorney General John Mitchell, former National Security Adviser (later Secretary of State) Henry Kissinger, and former Presidential aide H. R. Haldeman.

[2] These leaks included several involving the administration's policies

March 18, 1981

No. 79-880, Kissinger

Dear John:

Enclosed are two versions of my memorandum in Kissinger. The first is the fifth draft of the opinion that would hold that the President has absolute immunity. The second is a first draft of a version holding that there is no Bivens action in the first place. I think the Bivens approach is preferable, if there are five votes for it.

In both versions, I have added most of the changes you suggested in your letter of March 10, that I found quite helpful. Changes 1, 3, and 4 are incorporated in full. With respect to number 2, I have altered the sentence, rather than omitting it.

Concerning change 5, I have incorporated most of the revisions of the paragraph that you suggest. I think the opinion still suggests that the absolute immunity of Kissinger and Mitchell is limited to national security matters, but it is now less definite about this. Because the opinion still places great emphasis on the question of the purpose of an action, I have not deleted the footnote, as you suggested in number 6. Rather, I have altered it in a way that softens the "debate" with Byron.

Finally, I have followed the footnote you proposed in number 7, with one exception. On lines 12 and 13 of that footnote you state that if the purpose of the wiretap remained related to national security, Mitchell and Kissinger would have qualified immunity from constitutional liability, in addition to immunity under the statute. I do not think it clear that these two petitioners have qualified immunity under the Constitution, even if the purpose of the wiretap remained legitimate--since the violation of the reasonableness requirement was quite egregious. Cf. the discussion of Haldeman's liability. Rather, under my

analysis, Mitchell and Kissinger would have absolute immunity.

I hope you will agree that these changes adopt substantially your suggestions. I think you have helped me improve the opinion. I hardly need say that I am grateful for the time and thought you have generously given me on this important case.

Sincerely,

Mr. Justice Stevens

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 18, 1981

79-880 Kissinger

MEMORANDUM TO THE CONFERENCE:

I circulate herewith two memoranda in this tiresome case:

1. A 5th draft of the memorandum assigned to me by the Chief to write. This addresses the immunity issues, decided below and argued by the parties (Version I).

2. A 1st draft of "Version II," which considers whether a Bivens damage suit may be brought against the President and concludes that it may not. See my memorandum to the Conference of February 26. The remainder of Version II, applicable to the other three petitioners, is substantially identical with Version I.

As it now appears that there is a Court for absolute immunity for the President, you may think it unnecessary to consider the Bivens question. Yet this is a threshold question, and one we may address properly even though not raised below. I therefore would prefer to decide Nixon's appeal on this basis if there were the requisite votes to hold that a Bivens action does not lie against the President.

We may be irreconcilably divided as to the appropriate standard of immunity for the other three petitioners. But I would be hesitant to accept a summary affirmance by an equally divided Court. The reasoning in Byron's and my memoranda differs substantially from that of the CADC, with possibly different results as to when liability may have commenced and whether liability, if any, derives from the Constitution or from Title III or from both. Moreover, we all appear to agree that Haldeman has only qualified immunity, as the CADC held. There is no split on that question.

I doubt, therefore, that we may properly avoid writing and simply affirm CADC by a 4 to 4 vote with respect to these petitioners. If this case were to go down without the benefit of opinions here, the DC would be required to follow CADC's opinion, with a result - and certainly an analysis - that could differ from Byron's and mine.

In sum, given the problem of an eight-member Court (with WHR presumably disqualified only because Mitchell is a party), I am inclined to think we should record our views on the three Cabinet-level petitioners, in addition to deciding the case with respect to the President.

If you are "sick and tired" of this case, imagine the degree of combat fatigue suffered by Byron and me.

L.F.P.

L.F.P., Jr.

ss

13, 15, 16, 19, 20, 21, 22, 23, 25
27, 28, 32, 33, 34

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

From: Mr. Justice Powell

3-18-81

Circulated: _____

Recirculated: MAR 18 1981

5th DRAFT (Version I)

SUPREME COURT OF THE UNITED STATES

No. 79-880

Henry Kissinger et al., Petitioners,
v.
Morton Halperin et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1981]

Memorandum of JUSTICE POWELL.

In this case involving a warrantless wiretap placed on the telephone of a staff member of the National Security Council (NSC), we are faced with issues regarding the scope of the immunity from suits for damages possessed by the President of the United States and his senior aides.[1] The central question is whether the Court of Appeals for the District of Columbia Circuit was correct in according petitioners an immunity conditioned on a showing of "good faith," rather than a more absolute immunity that is unrelated to their subjective intentions and the objective reasonableness of their interpretations of the controlling law.

I

During the early part of 1969, President Richard Nixon and his close associates were faced with a number of unauthorized disclosures to the press of sensitive information concerning national security matters.[2] In their view, these

[1] Petitioners here are former President Richard Nixon, former Attorney General John Mitchell, former National Security Adviser (later Secretary of State) Henry Kissinger, and former Presidential aide H. R. Haldeman.

[2] These leaks included several involving the administration's policies relating to the war in Vietnam In addition, there were leaks concerning the strategic arms limitation talks with the Soviet Union, and other sensi-

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 6, 1981

79-880 Kissinger v. Halperin

Dear Thurgood:

It is good of you to continue giving thought to ways to reach some sort of decision in Kissinger.

You may recall that we are holding two cases for Kissinger involving the "whistle blower" Fitzgerald. Nixon is the petitioner in No. 79-1738, Alexander Butterfield and Bryce Harlow are the petitioners in the other case, No. 80-945. The only reason that Bill Rehnquist is "out" of Kissinger is the presence as a party of Mitchell, for whom Bill worked.

The pendency of these cases may be relevant to your inquiry whether the idea of carrying Kissinger over for reargument has merit. Rehnquist, of course, would continue to be out because of Mitchell's presence. If the vote after reargument remained 5 to 3 as at present, there would be no problem - except the further delay in resolving the issues. If, however, there were a change of mind by any one of the present majority, resulting in a 4-4 split as to Nixon, the opinion of CADC would be the law of the case in the retrial before the District Court.

This would create a problem. There would certainly be four votes to grant Nixon v. Fitzgerald, which also presents the absolute immunity issue, and in which we would have a full Court. It would be some months, however, before that case could be decided. Meanwhile, the District Court in Kissinger may have gone ahead with a retrial on the basis of the CADC opinion. If Bill Rehnquist voted for absolute immunity in the Fitzgerald case, it is reasonable to assume that at least four of us who now share that view would continue to entertain it. Thus, we would end up sometime next year with Kissinger having been remanded to the DC for trial - and quite possibly retried - based on a decision with respect to absolute immunity for the President that would later be discredited.

In sum, in considering all of the alternatives, it seems to me that if the five of us remain firm as to the President, we should decide the case at this Term. Otherwise, for the reasons indicated above, we will postpone ultimate decision of the issue until Rehnquist can participate in Nixon v. Butterfield - with all of the possible confusion and delay incident to that course of action. Nor, indeed, is it likely that we will know any more about this case after a reargument than we know now.

Although the Court may be split 4-4 as to the immunity to be accorded Kissinger and Mitchell, the differences there are not necessarily substantial in terms of the ultimate outcome. Under my view, the District Court could still impose liability on these two petitioners for any actions occuring after a bona fide national security purpose no longer existed.

I think we are together with respect to qualified immunity for Haldeman throughout.

In any event, I am most grateful to you for trying to help me arrive at a proper resolution of this troublesome case.

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss

21, 22, 24, 34

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

4-6-81

From: Mr. Justice Powell

Circulated: APR 8 1981

6th DRAFT (Version I) Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 79-880

Henry Kissinger et al., Petitioners,
v.
Morton Halperin et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1981]

Memorandum of JUSTICE POWELL.

In this case involving a warrantless wiretap placed on the telephone of a staff member of the National Security Council (NSC), we are faced with issues regarding the scope of the immunity from suits for damages possessed by the President of the United States and his senior aides.[1] The central question is whether the Court of Appeals for the District of Columbia Circuit was correct in according petitioners an immunity conditioned on a showing of "good faith," rather than a more absolute immunity that is unrelated to their subjective intentions and the objective reasonableness of their interpretations of the controlling law.

I

During the early part of 1969, President Richard Nixon and his close associates were faced with a number of unauthorized disclosures to the press of sensitive information concerning national security matters.[2] In their view, these

[1] Petitioners here are former President Richard Nixon, former Attorney General John Mitchell, former National Security Adviser (later Secretary of State) Henry Kissinger, and former Presidential aide H. R. Haldeman.

[2] These leaks included several involving the administration's policies relating to the war in Vietnam In addition, there were leaks concerning the strategic arms limitation talks with the Soviet Union, and other sensi-

13, 14, 15, 18, 21, 26, 35

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

4-7-81

From: Mr. Justice Powell

Circulated: APR 8 1981

2d DRAFT (Version II) Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 79-880

Henry Kissinger et al., Petitioners,
v.
Morton Halperin et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1981]

Memorandum of JUSTICE POWELL.

In this case involving a warrantless wiretap placed on the telephone of a staff member of the National Security Council (NSC), we are faced with various issues raised by suits for damages alleging constitutional violations by the President of the United States and his senior aides.[1] One question is whether a President can be sued for damages in such a case. Another is whether the Court of Appeals for the District of Columbia Circuit was correct in according petitioners an immunity conditioned on a showing of "good faith," rather than a more absolute immunity that is unrelated to their subjective intentions and the objective reasonableness of their interpretations of the controlling law.

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During the early part of 1969, President Richard Nixon and his close associates were faced with a number of unauthorized disclosures to the press of sensitive information concerning national security matters.[2] In their view, these

[1] Petitioners here are former President Richard Nixon, former Attorney General John Mitchell, former National Security Adviser (later Secretary of State) Henry Kissinger, and former Presidential aide H. R. Haldeman.

[2] These leaks included several involving the administration's policies

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 19, 1981

79-880 Kissinger

MEMORANDUM TO THE CONFERENCE:

I recirculate a third draft of Version II in this case for two reasons. The changes indicated, for the most part, are in response to Byron's last circulation.

As I have had two versions outstanding, it seems desirable to focus on one. Potter and John have indicated a preference for Version II, although they would join either. The Chief Justice has indicated no preference, but would join either. Although it is self-evident that I would join either of my versions, I am inclined to join Potter and John in having a mild preference for Version II.

Accordingly, absent dissent from my agreeing Brothers, I am settling on Version II.

L.F.P.

L.F.P., Jr.

SS

9, 10, 13, 16, 17
19, 20, 21, 32, 33

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

5-18-81

From: Mr. Justice Powell

Circulated: _____

3d DRAFT (Version II)

Recirculated: MAY 19 1981

SUPREME COURT OF THE UNITED STATES

No. 79-880

Henry Kissinger et al., Petitioners,
v.
Morton Halperin et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1981]

Memorandum of JUSTICE POWELL.

In this case involving a warrantless wiretap placed on the telephone of a staff member of the National Security Council (NSC), we are faced with various issues raised by suits for damages alleging constitutional violations by the President of the United States and his senior aides.[1] One question is whether a President can be sued for damages in such a case. Another is whether the Court of Appeals for the District of Columbia Circuit was correct in according petitioners an immunity conditioned on a showing of "good faith," rather than a more absolute immunity that is unrelated to their subjective intentions and the objective reasonableness of their interpretations of the controlling law.

I

During the early part of 1969, President Richard Nixon and his close associates were faced with a number of unauthorized disclosures to the press of sensitive information concerning national security matters.[2] In their view, these

[1] Petitioners here are former President Richard Nixon, former Attorney General John Mitchell, former National Security Adviser (later Secretary of State) Henry Kissinger, and former Presidential aide H. R. Haldeman.

[2] These leaks included several involving the administration's policies

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 26, 1981

No. 79-880 Kissinger

MEMORANDUM TO THE CONFERENCE:

As only a few more weeks remain before WJB's ferry leaves Woods Hole, I am prompted - though unhappily - to bring the status of this case to our collective attention.

Suit Against a President

The vote at Conference was 5-3 for absolute immunity for a President. I circulated a memorandum supporting absolute immunity and it received the general approval of the Chief, Potter and John. I also have circulated a memorandum (Version II) arguing that a Bivens suit does not lie against the President. I understand that this version is now supported by the four of us. (See my letter of May 19.)

Thurgood has not joined either memorandum, but in his letter of March 11 stated that based on the constitutional history he "would reverse the Court of Appeals in so far as it rejected petitioner Nixon's claim of absolute immunity." Thurgood indicated that he was doing some further investigation of the relevant history. Assuming that Thurgood finds nothing that alters his tentative vote, there would be a Court for the view that the President cannot be sued, although perhaps Thurgood would wish to write separately.

Byron, viewing this as a Title III case, would accord a President qualified immunity only. Bill Brennan and Harry agree.

If we should end up without a Court on the President's case, possible dispositions for this Term would be (i) affirm on this issue by a 4-4 vote, or (ii) carry the

case over for reargument next Term. There are serious objections to either of these courses.

We are holding two cases for Kissinger involving the "whistle blower" Fitzgerald -- 79-1738, Nixon v. Fitzgerald, and 80-945, Harlow v. Fitzgerald. The pendency of these cases is quite relevant to the Kissinger case, particularly the position of the President. The question of Presidential liability is identical in Nixon v. Fitzgerald and the present case. My understanding is that Bill Rehnquist is "out" of Kissinger because of the presence of Mitchell as a party. As Bill had nothing whatever to do with the subject matter of this case, I suppose Bill would feel free to sit in both Fitzgerald cases. If we were to affirm Kissinger by a 4-4 vote this Term, I assume there would remain four votes to grant the Fitzgerald cases.

If we followed the foregoing course, we would end up with an anomalous situation next Term. Kissinger would have been remanded by CADC for trial in light of its decision. Yet, we would have pending here for argument and decision the identical issues. I suppose it is possible that the DC would defer trial until we decided the Fitzgerald cases, although the Kissinger litigation has been in the courts for some eight years already, and the parties are entitled to a decision. If the DC proceeded with trial before the Fitzgerald cases were decided, it is at least possible - if not indeed probable - that this Court would later adopt positions quite incompatible with those of CADC. Putting it differently, the Kissinger case might be retried under erroneous principles.

If we carried Kissinger over for reargument, and granted the Fitzgerald cases so that they also could be argued next Term, I do not know whether Bill Rehnquist would feel free to take part in them. Unless he did, there is little reason to believe that the views we entertain now would change. Few cases since I have been on the Court have received more thorough examination than Kissinger.

Kissinger, Mitchell and Haldeman

The Court now appears to be split 4-4 as to the immunity to be accorded Kissinger and Mitchell, although the practical difference may not be substantial on retrial. Under my view, the District Court could impose liability on these two petitioners, subject to qualified immunity, for conduct occurring after a bona fide national security

purpose ceased to exist. Under Byron's view, liability could be imposed, subject to the same immunity, for the entire period of the tap.

With respect to Haldeman, we seem to be unanimous - though perhaps under somewhat different theories - in concluding that qualified immunity is all that existed throughout his involvement.

In sum, if Thurgood remains with his tentative view as to a President, we can conclude this case at this Term. The courts below would have clear guidance with respect to Nixon and Haldeman. The guidance would be unclear as to Kissinger and Mitchell, although the practical difference may not be as significant as our long debate seems to indicate.

If we bring the case down this Term, I suppose Nixon v. Fitzgerald - now being held - could be GVR'ed on Kissinger. We could grant Harlow v. Fitzgerald, and with Bill Rehnquist's participation, clarify any ambiguities or differences that then exist with respect to qualified immunity of a Presidential assistant acting pursuant to a President's direction.

In view of the extensive writing that may be required to convert a memorandum into a Court opinion - and the likelihood of other writing - I suppose we should make a decision in the fairly near future.

Sincerely,

Lewis

LFP/lab

June 2, 1981

79-880 Kissinger v. Halperin

Dear Potter and John:

As we have shared common views in this case, I would be grateful if you would let me know whether the enclosed draft of a memorandum to the Conference meets with your approval.

I will, of course, welcome any suggestions.

Sincerely,

Mr. Justice Stewart
Mr. Justice Stevens

lfp/ss
Enc.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 2, 1981

79-880 Kissinger v. Halperin

MEMORANDUM TO THE CONFERENCE:

This refers to Thurgood's memorandum of May 27, and to what action the Court should take in this important case.

We now are deadlocked 4-4 on the central issue of presidential immunity. Having completed his review of the historical evidence, Thurgood no longer would accord absolute immunity to a President. Nor would he hold that a President is immune from a Bivens-type action.

Thurgood could "join a majority" to grant reargument, consolidated with Nixon v. Fitzgerald and Harlow v. Fitzgerald. For the reasons indicated in my memorandum of May 26, I do not think reargument would serve a useful purpose.

With the exception of the Nixon Tapes Case, I have taken part in no case that has received as careful and exhaustive (and exhausting!) consideration as this one. Between us, Byron and I have circulated, and several times revised and recirculated, memoranda that now total nearly 100 printed pages in their latest versions. Historical research also has been thorough, with Thurgood completing his only recently. The careful consideration we have given this case was against the background of lengthy opinions by the DC and CADC, and thorough briefing by competent counsel.

I think it fair to say that the only realistic chance of resolving the present deadlock is to have a full Court. Bill Rehnquist's memo of May 27 reaffirms that Mitchell's presence as a party in the Kissinger case is the only reason he has been a "bystander". Presumably, he therefore would be able to participate in the Fitzgerald cases, as Mitchell is not involved in either. On the other hand, I assume - unless Bill advises us to the contrary - that if we set Kissinger for reargument and also granted the Fitzgerald cases, Bill still would be "out" - at least with

respect to any issue that might affect Mitchell. We therefore in all probability would find ourselves again without a full Court. Also we would have assumed the unnecessary burden of a reargument and the parties would bear the burden of the consequent delay.

Although no course of action is without some negatives, I recommend that we affirm CADC by our present 4-4 vote, and at the same time grant certiorari in the two Fitzgerald cases. As Mitchell no longer will be a party before this Court, Bill Rehnquist could sit and thereby give us a full Court.

An affirmance would result, I suppose, in the Kissinger case being remanded to the District Court for trial on the basis of CADC's opinion - the reasoning of which has not been fully accepted either in Byron's memorandum or mine. This is not a desirable situation, but there are several possibilities. The Kissinger case may not come to trial in the DC before we decide the Fitzgerald cases. If the DC case is tried to judgment, we can only speculate as to the outcome. Depending on the evidence, it could be mooted. In any event, it seems to me that we would be free to decide the Fitzgerald cases without regard to a case that no longer was pending before this Court.

I have had my clerk, Paul Smith, review carefully the Fitzgerald cases to make sure that we could reach the merits, and that some - if not all - of the major questions presented in Kissinger are squarely presented. As the enclosed memorandum indicates, there is no serious procedural question - at least none for me. The issues with respect to the President - both absolute immunity and Bivens - are clearly presented. With respect to Harlow and Butterfield, we also could decide whether a Bivens suit lies against them, and the type of immunity available. The Title III issue is not presented, as these are not wiretapping cases. That issue may now be less important because the new 1978 Act would control in future cases involving foreign intelligence. In any event, in Fitzgerald we should be able to address and decide the more fundamental questions.

L.F.P., Jr.

ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 10, 1981

79-880 Kissinger v. Halperin

MEMORANDUM TO THE CONFERENCE:

At last week Conference, we discussed the disposition of this case. There is a 4-4 split with respect to all of the petitioners except Haldeman. As to him, there is a majority for the view that he is not entitled to any greater immunity from damage suits than that accorded by the courts below. I therefore suggest a brief Per Curiam disposition along the following lines:

PER CURIAM

The judgment with respect to petitioners Kissinger, Nixon and Mitchell is affirmed by an equally divided Court. The Court is agreed that the position and functions performed by petitioner Haldeman do not create grounds for any greater immunity from damages suits than that accorded to him by the United States Court of Appeals for the District of Columbia Circuit. The judgment with respect to petitioner Haldeman therefore is affirmed. Justice Rehnquist took no part in the consideration or decision of this case.

We made no decision last week, and it was suggested that we also consider the possibility of dismissing the case due to an absence of ripeness. I enclose a memorandum in which I summarize my thinking as to why this would be a less desirable - indeed perhaps even misleading - disposition of the case.

I appreciate that in these circumstances there is no completely ideal disposition. Even with respect to Haldeman it might be said that a Per Curiam along the above

lines could be misunderstood. Such a PC would not answer all possible questions with respect to Haldeman, but I think it comes closest to reflecting the division on this Court. It should serve to limit our affirmance to the issue of the scope of Haldeman's immunity from constitutional suits, and leave open other issues as to which the Court is divided.

In sum, I would favor a Per Curiam along the lines set forth above, and the granting of the Fitzgerald cases for consideration by a full Court - perhaps to be heard early in October.

L.F.P.

L.F.P., Jr.

ss

June 10, 1981

MEMORANDUM TO THE CONFERENCE

In our brief discussion last week as to the disposition of this case, as a possible alternative to a "4-4 affirmance" it was suggested that we could exercise our discretion to dismiss the case. We hardly could say that the writ was improvidently granted. The possibility mentioned was that we could dismiss on the ground that the case is not ripe for our decision.

I have given some further thought to this possibility. If I understand it, such a disposition would not seem to be appropriate.

It is true that some factual issues remain to be decided by the District Court. But the issues that are before us and prompted us to grant the case were fully addressed by the courts below and, as Byron and I may have persuaded you, they have been considered with great care and thoroughness here. In a purely personal sense, I "gag" a bit on the suggestion that what we have worked on for months was not in fact sufficiently presented for us to decide.

But apart from any personal disquiet, I would think that a ripeness ruling would give wrong signals to the courts below and, in the end, probably would not prevent our being asked to decide the legal questions two or three years from now. The situation, as I see it, may be summarized briefly as follows.

The standard ripeness case is a far cry from the present case, in which there has been specific conduct, and the details of that conduct were sufficiently established in the lower courts to allow a full decision on the legal issues presented here. After extensive discovery, the District Court considered as undiputed facts the scope, duration, and results of the Halperin wiretap. There also is no dispute about the background of press leaks that preceded the imposition of the wiretap. These facts allowed the District Court to find the wiretap constitutionally unreasonable, and find as a matter of law that petitioners lacked a good-faith defense to such a claim. The court therefore granted summary judgment to respondents.

To be sure, it has not yet been established exactly when the wiretap became unreasonable. The CADC remanded on this point. Nor do we know for sure when, if ever, the purpose of petitioners shifted away from protection of national security toward some political goals. But these facts are unnecessary to this Court's decision

concerning the issues presented in the petition for certiorari.

Those legal issues do not depend on any facts that have yet to be established. The first issue is whether a Bivens action may be brought against a President for unconstitutional actions. The second is whether a President or his close aides have absolute immunity from damages suits based on wiretaps. If we dismiss the case for lack of ripeness (or for whatever reason) the courts below simply will follow the existing rulings of the CADC on these issues. Our resolution of these issues therefore would not be aided or clarified in any way by further trial in the District Court. The lower courts will pay no attention whatever to these preliminary issues, and will focus exclusively on the scope of petitioners' liability.

Petitioners also raise arguments in their petition concerning the application of qualified immunity in the lower courts. They argue that they should have good-faith immunity as a matter of law because they were promoting national security and in 1969-71 it had been understood since the Truman Administration that the President could do this through wiretaps without statutory or constitutional constraints. While it might be interesting to know more about petitioners' actual motivations prior to deciding these issues, this factual question is not presented here

and it is irrelevant to the questions of law that were already decided below and that we granted cert to review.

In sum, it is hard to see how this case could be labelled not ripe for review, or how we appropriately could exercise discretion not to address the legal issues. They are squarely presented with an adequate factual record. Although it is possible that the constitutional issues would be mooted on remand if all of the petitioners were found liable under Title III, this possibility certainly does not affect the ripeness of the case. Moreover there is the further point that Title III liability may not extend as far as constitutional liability in this case.

Advantages of the 4-4 Disposition

A 4-4 disposition would provide some guidance to the lower courts. They would have the benefit of the knowledge that at least four Justices would give some greater level of immunity to high executive officials than that accorded by the CADC. This knowledge would lead to some caution in the courts about imposing liability on the President and his aides, until this Court is able to provide more definitive guidance--hopefully in the Fitzgerald case.

A dismissal on ripeness would provide no guidance, and even could be read as implying approval of CADC's decision on the legal and constitutional issues.

L.F.P., Jr.

lab

L.F.P.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 16, 1981

79-880 Kissinger v. Halperin

MEMORANDUM TO THE CONFERENCE:

In accordance with my understanding of our decision last Thursday, I circulate a brief Per Curiam disposition of this case.

PER CURIAM

The judgment with respect to petitioners Kissinger, Nixon and Mitchell is affirmed by an equally divided Court. With respect to petitioner Haldeman, the writ of certiorari is dismissed as improvidently granted. Justice Rehnquist took no part in the consideration or decision of this case.

If this is agreeable, I suppose the Chief Justice can announce our action next Monday.

L.F.P., Jr.

SS

LFP
Your proposed Per Curiam is OK with me

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

From: Mr. Justice Powell

6-17-81

Circulated: JUN 17 1981

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 79-880

Henry Kissinger et al., Petitioners, *v.* Morton Halperin et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1981]

PER CURIAM.

The judgment with respect to petitioners Kissinger, Nixon and Mitchell is affirmed by an equally divided Court. With respect to petitioner Haldeman, the writ of certiorari is dismissed as improvidently granted.

JUSTICE REHNQUIST took no part in the consideration or decision of this case.

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

6-18-81

From: Mr. Justice Powell

Circulated: _____

Recirculated: JUN 18 1981

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-880

Henry Kissinger et al., Petitioners, *v.* Morton Halperin et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1981]

PER CURIAM.

The judgment with respect to petitioners Kissinger, Nixon and Mitchell is affirmed by an equally divided Court. With respect to petitioner Haldeman, the writ of certiorari is dismissed as improvidently granted.

JUSTICE REHNQUIST took no part in the consideration or decision of this case.

June 22, 1981

Holds for 79-880 Kissinger v. Halperin

Dear Potter and John:

We are holding a number of cases for Kissinger. The enclosed draft of a memorandum was prepared by one of my clerks after we discussed the possibility of a continuing recusal problem for WHR.

Three of these cases (actually only two litigations) involve Mitchell: Nos. 79-881 and 883, Mitchell v. Zweibon and Zweibon v. Mitchell and 79-1120 Mitchell v. Forsyth. These cases involve wiretaps against the Jewish Defense League (Zweibon) and a college professor (Forsyth) who allegedly planned to sabotage utility tunnels in Washington. The latter case also involved a wiretap of the Black Panther Party. In each of them Mitchell claims both absolute and qualified immunity. The substantive issue, involving Title III, is unrelated to the Fitzgerald cases. A hold for Fitzgerald, in the two Zweibon cases would be appropriate. I also think we could deny the petitions in view of the different substantive issue, and allow them to go to trial just as Kissinger may go to trial.

Mitchell v. Forsyth, decided by CA3, has been remanded for factual findings. I think we could deny this case, although it probably should be treated the same way as Zweibon.

The other two "holds" present no problem. 79-882 Nixon v. Smith, involves only Nixon, and 80-1148 Chagnon v. Bell and others, do not involve Mitchell.

I would like the benefit of your thinking before we go to Conference on Thursday, as normally these cases will come up for consideration then.

Sincerely,

Mr. Justice Stewart
Mr. Justice Stevens

lfp/ss

LFP

June 24, 1981

MEMORANDUM TO THE MEMORANDUM

Heretofore Held for No. 79-880, Kissinger v. Halperin

1. Nos. 79-881, -883, Mitchell v. Zweibon and Zweibon v. Mitchell (cert to CADC).

These cases involve a lawsuit by members of the Jewish Defense League against John Mitchell, based on wiretaps of JDL offices in 1971. Mitchell is the only defendant. The taps were started after there were reports of planned attacks by the JDL against foreign dignitaries at the U.N. The DC refused to award damages under either the Fourth Amendment or Title III, concluding that retroactive effect should not be given either to United States v. United States District Court, 407 U.S. 297 (1972) (constitutional warrant requirement applied to domesstic security case), or to Zweibon v. Mitchell, 516 F.2d 594 (CADC 1975) (Zweibon I) (Title III does not exempt national security taps that do not involve foreign agents). The CADC reversed with respect to the constitutional claim against Mitchell.

Mitchell's petition argues that he should have absolute immunity as the President's agent acting to protect national security. The plaintiffs' cross-petition argues that they should have the benefit of the statutory ruling in Zweibon I.

The Title III issue is unrelated to the Fitzgerald case, which involves a retaliatory dismissal of an employee. Although Fitzgerald will raise the issue of the absolute immunity of Presidential aides acting in concert with the President, there is no suggestion in Zweibon of any

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 27, 1981

MEMORANDUM TO THE CONFERENCE

Re: No. 79-880 Kissinger v. Halperin

I have been a bystander in this case for the reason that Lewis has stated in his memorandum of May 26th -- the fact that John Mitchell is a party individually, and not simply as an attorney for a client. I would not really know how to draw any "time" line the way the rest of us have done with clients served by firms, and so I do not see any possibility of ever participating in this case. Certainly, not having heard oral argument or participated in the Conference discussion, I would feel totally disqualified from casting any vote either on the merits of the case or on its disposition at the close of this Term.

As to Nos. 79-1738, Nixon v. Fitzgerald, and 80-945, Harlow v. Fitzgerald, I do not regard myself as having any similar disqualification. I have not followed the voluminous exchanges between Lewis and Byron with respect to the disposition of Kissinger with anything like the closeness one would follow exchanges in a case in which he were expected to cast a vote, although I have received copies of circulations from both of them. The only thing remotely similar to a four-four affirmance in which I did not participate since I have been here was a case in which I as hospitalized during the October Term of 1976 and therefore did not participate in either the oral arguments or the Conference discussion. When I returned to work, I was advised that the Conference vote had been four-four (I believe it was a sex discrimination case involving a Philadelphia high school) and several of the "brethren" discussed at Conference whether or not the case should be set down for argument before a full Court or whether it should be left as affirmed by an equally divided Court. As I recall, I was present during the discussion, may have contributed to it in some way, but did not vote on the

question of whether it should be set down for reargument or whether it should simply be affirmed by an equally divided Court. As I recall, the decision of the Conference was to affirm by an equally divided Court.

Sincerely,

WEB

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 8, 1981

Re: 79-880 - Kissinger v. Halperin

Dear Lewis:

My thought on the revision of the second sentence in footnote 26 on page 40 was to make it read something like this:

> "There, the Court held that a state judge who had approved a parent's petition seeking sterilization of a child was entitled to absolute immunity because he had jurisdiction to entertain the petition; notwithstanding the fact that his action was erroneous as a matter of state law and that he acted ex parte, his absolute immunity protected him from damage liability. The Fifth Circuit recently applied that holding to a judge who had acted corruptly but who, like the judge in Stump, had not acted in excess of his jurisdiction."

I would also suggest omitting the quotation from the dissent in Stump in footnote 21 on page 27 because the plaintiff did have a right to sue the conspirators in the state courts and probably the federal courts as well.

Respectfully,

Justice Powell

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 15, 1981

Re: 79-880 - Kissinger v. Halperin

Dear Lewis:

The two most important parts of your memorandum are: (1) the recommendation of absolute immunity for the President; and (2) the rejection of the concept of derivative absolute immunity. I am persuaded on both of these points.

With respect to the immunity for the Attorney General and the National Security Advisor, I also agree that on this record they should be immune from damage liability for their participation in the initial authorization of the wiretap. I have some problem, however, with the use of "subjective intent" (memo p. 21) and "actual intent" (memo p. 22) as the test for defining the scope of the immunity. I would like to try to work out a standard that could not be defeated by a complaint allegation of improper motive. If I am unable to work out a satisfactory proposal, I will no doubt end up simply joining what you have proposed. Alternatively, I may join and write something in addition suggesting that I would accord a somewhat greater immunity to these two officials than your memorandum proposes.

Subject to studying what others will write and to my further work on the "subjective intent" concern that I have mentioned, I expect to join your memorandum. I might add that I find it a most impressive and persuasive document.

Respectfully,

JPS

Justice Powell
Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 3, 1981

MEMORANDUM TO THE CONFERENCE

Re: 79-880 - Kissinger v. Halperin

Despite the different approaches and different conclusions expressed in the thoughtful memoranda prepared by Lewis and Byron, they have persuaded me that we have not yet adequately explored a possible common ground for disposing of this unusually important case. Whether or not such a common ground does exist, they have also persuaded me that we should at least confront the threshold question whether--or to what extent--Title III has pre-empted the judicially created Bivens-type cause of action in the wiretap area.

As a preliminary matter, I should point out that my thinking is influenced by Bill Rehnquist's draft opinion in Milwaukee v. Illinois. Although I am in dissent in that case because I read § 505(e) as expressing an intent to preserve previously recognized judicially created remedies, his analysis may control the Title III pre-emption question in this case--particularly since Title III contains no counterpart to § 505(e).

Purely as a matter of proper judicial procedure, the question whether there is any nonstatutory cause of action for damages resulting from an illegal wiretap should be addressed before reaching the question whether an immunity defense is available. It seems to me that that question breaks into two parts:

(1) Is there a nonstatutory remedy for a tap that is prohibited by Title III?

(2) Is there a nonstatutory remedy for a tap that is permitted by Title III?

For the purpose of this memorandum, I shall assume that all warrantless wiretaps are prohibited by Title III unless they fall within the exception (or the "exemption" or "disclaimer") defined by § 2511(3). I shall call the taps prohibited by the statute "Title III taps." I shall assume that all other wiretaps are covered by § 2511(3) and shall refer to them as "non-Title III taps."

Byron's memorandum has convinced me that in the Title III area Congress intended the statutory remedy to be the exclusive federal remedy. (See his memo at page 7, 13-17.) If that is the case, there is no reason to consider any petitioner's possible immunity defense to a nonstatutory cause of action claiming damages from a Title III tap, since he has no potential liability on any such nonexistent claim.

Byron suggests that we should therefore confront the quite different question of what sort of immunity may be available as a defense to the Title III claims. For several reasons, I would not do so. First, is the strong policy against the unnecessary or premature adjudication of constitutional issues (see Byron's memo at page 29). Second, is the fact that the Title III question was not presented by the certiorari petition. Third, is the strong possibility that some or all of the defendants may prevail on the Title III issue on remand and therefore the constitutional issue can be avoided entirely. Four--and perhaps of greatest importance--the question of presidential immunity for a statutory remedy is significantly different from the question of immunity from a nonstatutory damage claim; the question has not been argued; its decision without the benefit of full briefing and argument may unnecessarily fractionate the Court. In sum, after holding that the Title III remedy is the exclusive federal remedy for a Title III tap, I would put all three Title III issues to one side.

If we should follow that course, all that would remain would be a claim for damages based on non-Title

III taps. By hypothesis, those taps are not prohibited by the statute. Indeed, since they necessarily fall within the § 2511(3) exception, there are several reasons why they should not give rise to a nonstatutory damage liability. First, I think Congress has implicitly approved of their reasonableness. Second, even apart from that congressional approval, I should think they would be reasonable within the Fourth Amendment. Third, whether or not the defendants are entitled to absolute immunity, they would surely be entitled to a qualified immunity for taps that fall within the express § 2511(3) exception. Fourth, on the basis of an objective functional analysis of the duties of the Attorney General and the National Security Advisor, I should think at least Mitchell, Kissinger, and the President would be absolutely immune.

My bottom line is to suggest that we consider disposing of the case by (1) holding that Title III provides the exclusive federal remedy for wiretaps that violate the statute; (2) holding that respondents have no nonstatutory federal remedy for wiretaps that are permitted by § 2511(3); and (3) not deciding whether or what immunities may be available as a defense to a Title III action.

Respectfully,

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 23, 1981

Re: 79-880 - Kissinger v. Halperin

Dear Lewis:

Your letter of February 4, 1981, in response to my memorandum of February 3, 1981, together with a re-examination of Keith persuade me that you are correct in your view that a wiretap that does not violate Title III may nevertheless violate the Fourth Amendment and give rise to a Bivens-type claim. It follows that I am still in essential agreement with the disposition you propose. I also think that the changes you made in your circulation of February 5, 1981, in response to Byron have substantially improved your memorandum. I still have the feeling, however, that there may be a possibility of narrowing the differences that are now reflected in your respective circulations.

First, I would like to suggest that your opinion be limited to wiretaps that do not violate Title III. Byron makes a persuasive argument that Title III provides the exclusive federal remedy for wiretaps that violate the statute. If we could either agree with him without qualification--which I would like to do--or at least assume for the purpose of deciding this case that he is right--I think we could eliminate the concern that your opinion is applicable even if Congress seeks to create a civil remedy against the President, and therefore also eliminate the need for Byron to address that problem. As I have already suggested, it would seem most unfortunate to address a constitutional question of that magnitude any sooner than necessary.

Second, I would like to suggest that we specifically address the question whether there is a judicially created Bivens-type damage remedy that may be asserted against the President of the United States. Your present memorandum--like the briefs of the parties but unlike your dissent in Davis v. Passman--simply

assumes that the Federal Judiciary has an "obligation to entertain private suits that Congress has not authorized" 442 U.S., at 252, and fails to consider "the range of policy and constitutional considerations that we would expect a legislature to ponder in determining whether a particular remedy should be enacted." Id., at 255. It seems to me that the reasons you give for holding the President absolutely immune would be even more persuasive if used to support the conclusion that no Bivens-type claim may be asserted against him. Perhaps that rationale might develop broader support than the present absolute immunity rationale.

Third, I still have some difficulty with the treatment of the immunity of the Attorney General and the National Security Advisor. I think the Attorney General is immune when he is performing the function of giving legal advice to the President and when he is performing the function of authorizing a national security wiretap. Similarly, I think the National Security Advisor is immune when he is identifying the persons on his staff who should be subjected to national security surveillance. If the record discloses that Mitchell and Kissinger peformed these functions at the outset of the wiretap, they should be immune for that conduct.

If the wiretap became illegal at a later date, I do not believe either Mitchell or Kissinger became liable unless one of them did something else at a later date. I am not yet persuaded that either of them had a continuing duty to terminate the tap before it became unreasonable; rather, I think liability would have to be predicated on evidence of some additional non-immune conduct by one of them. As presently written, the last sentence in Part IV-A on page 25, and footnote 41, seem to me to be somewhat inconsistent with a purely functional, objective approach.

I had hoped to make more specific suggestions before the Conference last Friday, but have been diverted by other work and therefore will just hand you this rough draft in its present tentative form in order

to assure you that I am still searching for solutions in this most important case.

Respectfully,

Justice Powell

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 6, 1981

Re: 79-880 - Kissenger v. Halperin

Dear Lewis:

Replying to your memorandum of February 26, 1981, I would like to say that although I have already indicated substantial agreement with the position set forth in your original memorandum, I think there is a great deal of merit in your suggestion that there is no implied Bivens-type remedy against the President of the United States. As a matter of procedure, I think this is an issue that should be addressed at the outset by the Court and I think the reasons for granting immunity to the President provide even stronger support for a holding that the Judiciary should not create a nonstatutory damage remedy of this kind against him.

Moreover, I believe this approach will more clearly limit the scope of the Court's holding to wiretaps that do not violate Title III and therefore minimize the area of disagreement between you and Byron, since his opinion primarily is concerned with Title III problems. As I have already indicated, I think it is desirable for us to avoid discussing the Title III issues.

Respectfully,

John

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 10, 1981

Re: 79-880, Kissinger v. Halperin, et al.

Dear Lewis:

Perhaps it will be helpful to you in connection with your revision of your proposed opinion in this case if I identify the few problems that have troubled me with respect to your latest circulation. Perhaps you will consider revisions along these lines. I will refer to pages and footnote numbers on your fourth draft circulated on February 28, 1981:

(1) Page 15 of footnote 21. This footnote troubles me somewhat because I think there are four separate rationales and also because I think they are not listed in the correct order of importance in the footnote. May I suggest that the rationales are: (1) Learned Hand's rationale which you quote in footnote 21 that the official's performance of his office may be adversely affected; (2) that a busy official will not have sufficient time to perform his duties if he has to devote an excessive amount of time to the defense of litigation; (3) that worthy individuals will be deterred from entering public service; and (4) that occasionally a blameless official will actually be held liable. I strongly urge you to put what is now the first rationale last in your sequence because it is valid only to the extent that the federal judicial system does not function effectively.

(2) Page 19. I would hope you could omit the last sentence in the full paragraph stating that the omission of an explicit exemption for the President can only be explained by the view that such an exemption was intended. I agree with Byron that this is not a persuasive argument and I think it is unnecessary to the opinion.

(3) Page 24. In describing the functions of the Attorney General, I would feel more comfortable if you could indicate at the outset that one of his primary responsibilities is giving legal advice in all areas of executive performance, rather than merely referring to his function as a legal advisor as a portion of his national security responsibilities. In other words, perhaps you could make the first sentence of the second paragraph read something like this:

> "As Attorney General, petitioner Mitchell had primary responsibility for giving legal advice to the President of the United States and, indeed, to the entire Executive Branch of the Government of the United States. Moreover, Mitchell was given primary responsibility for the activities of the FBI in the national security area. . . ."

(4) In the portion of footnote 35 that carries over onto page 24, I wonder if it might not be appropriate to refer to two critical questions as remaining after we acknowledge that Congress has the power to impose some limits on Presidential wiretapping. First, there is a question in my mind as to whether Title III should be construed as having been intended to impose a damage remedy against the President. I am inclined to believe that much of the reasoning that supports the conclusion that there is no implied cause of action against the President, may also support the conclusion that a statute should not be read as imposing personal damages liability on the President unless the intent to do so is rather plainly expressed. If that question is preserved, then, of course, the second question is the one already identified in the footnote, namely, whether a constitutional problem is presented by such a statute.

(5) Page 27. I would like to suggest that you consider rewriting the paragraph referring to Kissinger to include the substance of the following:

> "During the Nixon Administration, petitioner Kissinger also had special responsibility and discharged special functions with respect to national security.41/ His office did not give him the power to authorize wiretaps, but he ~~certainly~~ was discharging his official functions when he identified the persons on his staff who might reasonably be considered responsible for national security leaks and, therefore, should be placed under official surveillance. His designation of Halperin as a person whose phone should be tapped was, therefore, absolutely immune from damage liability.
>
> The holding that the Attorney General and the National Security Advisor are absolutely immune from damage liability for their acts at the time the Halperin wiretap was initiated does not lead to the further conclusion that they may not be liable for actions taken at a later date when, arguably, the continued surveillance did not have a valid national security purpose. We need not, however, address that question here because their liability would then be based on Title III, and in their certiorari petition in this Court they do not claim any immunity from statutory liability."

(6) If a revision of this kind is made, it may be possible to omit footnote 42 and thereby minimize some of the area of debate with Byron.

(7) Page 33. Would you consider revising footnote 49 to read as follows:

"The standards involved in determining (i) when a wiretap fell into the former national security exemptions in Title III, 18 U.S.C. § 2511(3) (1976 ed.), and (ii) when the Attorney General and the National Security Advisor possess absolute immunity for their acts in the national security area, are not necessarily identical. Here, however, if the purpose remained related to national security throughout the life of the wiretap, then Kissinger and Mitchell have a valid good-faith defense with respect to Title III and therefore, at the very least, would also have qualified immunity from constitutional liability. See 424 F. Supp., 842 ("defendants' determination that Title III was inapplicable to the Halperin wiretap was reasonable during the period of surveillance," and they therefore have a good-faith defense). If, on the other hand, respondents prove on remand that at some point Kissinger and Mitchell were implicated in continuing the wiretap for the purpose of obtaining information useful against opponents in domestic politics--as respondents allege--these petitioners probably would be liable under the statute, since persons continuing a wiretap on a private family for this purpose could hardly meet the good-faith standard. If they are liable under the statute, there would, of course, be no occasion to consider whether liability could also be supported directly under the Constitution."

Respectfully,

John

Mr. Justice Powell

Draft letter to J P S explaining what we have done with his suggestions 5-7

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 19, 1981

Re: 79-880 - Kissinger v. Halperin

Dear Lewis:

Please join me in Version II.

Respectfully,

John

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 16, 1981

Re: 79-880 - Kissinger v. Halperin

Dear Lewis:

Please join me.

Respectfully,

JPS

Justice Powell

Copies to the Conference