

The Burger Court Opinion Writing Database

Nixon v. Fitzgerald

457 U.S. 731 (1982)

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



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

CHAMBERS OF
THE CHIEF JUSTICE

December 14, 1981

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

MEMORANDUM TO THE CONFERENCE:

The above cases are assigned to Lewis.

Regards,

WRB

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

File

CHAMBERS OF
THE CHIEF JUSTICE

PERSONAL

December 14, 1981

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

Dear Lewis:

Today's Conference generally confirmed the discussion and votes on the above. Unlike you, I regard the issue of absolute immunity as the threshold question. I would not reach Bivens first for there is nothing to "reach," and no lawsuit at all, if there is absolute immunity. Before the Tort Claims Act in 1946, for example, a Court would not inquire into "standing" of a plaintiff in a suit for negligence by the government. There was no liability, no lawsuit in which to have standing.

In this setting the assignment is made to you but I feel obligated to state that my view is irrevocable on absolute immunity. I believe at least Bill Rehnquist and Sandra stated that view at Conference.

I am still unable to understand why we should "duck" that issue when the votes are there. Byron can concur in the judgment on Bivens grounds. Put "hard," your choice is my vote or Byron's! Among other things you have a mild (!) headstart, given the 5-6 inches of memo, chiefly compiled by you and Byron. All of that exploratory development has been valuable. I will at least support your judgment.

Regards,

WRB

Justice Powell

He has the votes!

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



CHAMBERS OF
THE CHIEF JUSTICE

March 18, 1982

PERSONAL

Re: No. 79-1738 - Nixon v. Fitzgerald

Dear Lewis:

I will have some "thoughts" on this case. I particularly am concerned that - without intent to do so - on page 24, you seem to equate Congress and "the press." Heaven knows, they regard themselves as the Fourth Branch and primus inter pares at that!

On the merits, qualified immunity for a senior Presidential aide, cabinet or sub-cabinet officer, does no more than "buy" a lawsuit. Even assuming they will be "winnable" suits that will be only after much harassment and expense. If Harlow becomes law, as appears likely -- and if I were age 40 again -- I would not think one second of accepting the job I once held as Assistant Attorney General. I will be bound to say in dissent that the Court now literally invites "shakedown" suits. In 1956 when I left the Executive Branch, I could not have been "shaken down" for very much, but I'd be subject to harassing lawsuits and in court as a defendant-witness, paying other lawyers to defend me -- instead of being paid for being there!

Regards,

Justice Powell

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

CHAMBERS OF
THE CHIEF JUSTICE

March 18, 1982

Re: No. 79-1738 - Nixon v. Fitzgerald
80-945 - Harlow et al. v. Fitzgerald

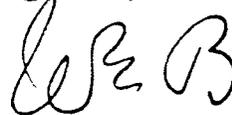
Dear Lewis:

In due course I will be joining you in 79-1738 and dissenting in 80-945. Since I am not prepared, now, to overrule Gravel sub silentio -- or otherwise.

A Presidential aide, for example, may be elbow-to-elbow with a President several times a day preparing to implement key government policies, while the cabinet officer you referred to may not see a President for weeks. If a Senator aide "inherits" the Senator's immunity, there is vastly greater reason why a senior Presidential aide, who deals with matters of far greater moment, is denied the same protection. Perhaps we are on the way to generating a new industry in the insurance world - "Public Liability Insurance" for public officials!

For me it simply "will not wash" to hold that the aides of a Senator with a few hundred thousand constituents and a dozen aides derive absolute immunity from the Senator, but that Senior Aides to a President -- who has 225 million constituents and a large staff of Senior Aides -- do not have the same immunity as those of Senator Gravel. Expressed or not this overrules Gravel or leaves our cases in irreconcilable confusion.

Regards,



Justice Powell

Copies to the Conference

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: MAR 31 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER, *v.*
A. ERNEST FITZGERALD

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

[April —, 1982]

Memorandum of Concurrence, CHIEF JUSTICE BURGER.

I write separately to emphasize that the presidential immunity spelled out today derives from and is mandated by the Constitution. Absolute immunity for a President is either implicit in the constitutional doctrine of separation of powers or it does not exist.

Although immunity for governmental officials in *Bivens* type actions may have been "of judicial making," *ante*, at 15, the immunity of a President from civil suits is not simply a doctrine derived from this Court's interpretation of common law or public policy. Of course we are "guided" by the Constitution, *ante*, at 15, but I could not join an opinion finding absolute immunity for the President based on some vague, undifferentiated theory independent of the Constitution.

The essential purpose of the doctrine of separation of powers is to allow for independent functioning of each co-equal branch of government within its assigned sphere of responsibility, free from risk of control or intimidation by other branches. *United States v. Nixon*, 418 U. S. 683, 706-707 (1974); *United States v. Gravel*, 408 U. S. 606, 617 (1972). Even prior to the adoption of our Constitution, judicial review of legislative action was recognized in some instances as necessary to maintain the proper checks and balances. *Den on the Dem. of Bayard & Wife v. Singleton*, 1 Martin 42

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: APR 22 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER, *v.*
A. ERNEST FITZGERALD

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

[April —, 1982]

CHIEF JUSTICE BURGER, concurring.

I write separately to emphasize that the presidential immunity spelled out today derives from and is mandated by the constitutional doctrine of separation of powers.

Although immunity for governmental officials in *Bivens* type actions may have been "of judicial making," *ante*, at 15, the immunity of a President from civil suits is not simply a doctrine derived from this Court's interpretation of common law or public policy. Of course we are "guided" by the Constitution, *ante*, at 15, but absolute immunity for a President must be found as an indispensable part of the Constitutional separation of powers or it does not exist.

The essential purpose of the separation of powers is to allow for independent functioning of each co-equal branch of government within its assigned sphere of responsibility, free from risk of control or intimidation by other branches. *United States v. Nixon*, 418 U. S. 683, 706-707 (1974); *United States v. Gravel*, 408 U. S. 606, 617 (1972). Even prior to the adoption of our Constitution, judicial review of legislative action was recognized in some instances as necessary to maintain the proper checks and balances. *Den on the Dem. of Bayard & Wife v. Singleton*, 1 Martin 42 (N.C. 1787); *Cases of the Judges of the Court of Appeals*, 4 Call's 135 (1788). *Cf. Marbury v. Madison*, 1 Cranch 137 (1803).

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

CHAMBERS OF
THE CHIEF JUSTICE



May 21, 1982

Re: No. 79-1738 - Nixon v. Fitzgerald

Dear Lewis:

I am glad you have moved away from the "policy" aspect and put the immunity holding squarely on the Constitution. This may lead me to modify my concurring opinion somewhat.

I may be in a position to deal with some of Byron's opulent rhetoric. On some of it he is just dead wrong both as to history and the Court's early utterances.

I'll get to work.

Regards,

A handwritten signature consisting of the letters 'W', 'R', and 'B' in a stylized, cursive font.

Justice Powell

cc: Justice Rhenquist
Justice Stevens
Justice O'Connor

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

CHAMBERS OF
THE CHIEF JUSTICE

June 2, 1982

Re: No. 79-1738 - Nixon v. Fitzgerald

MEMORANDUM TO THE CONFERENCE:

I will be circulating a revised concurring opinion as soon as the "machinery" permits. In my view the changes are largely stylistic, but that will be for each reader to decide.

Regards,



CHANGES THROUGHOUT

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: JUN 3 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

**RICHARD NIXON, PETITIONER v.
A. ERNEST FITZGERALD**

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

[June —, 1982]

CHIEF JUSTICE BURGER, concurring.

I write separately to underscore that the presidential immunity spelled out today derives from and is mandated by the constitutional doctrine of separation of powers. Indeed, it has been taken for granted for nearly two centuries.¹

The immunity of a President from civil suits is not simply a doctrine derived from this Court's interpretation of common law or public policy.² Of course we are "guided" by the Con-

¹ Presidential immunity for official acts while in office has never been seriously questioned until very recently. *Nixon v. Fitzgerald*, ante, at 18, n. 31. I can find only one instance in which a citizen sued a former president for acts committed while in office. A suit against Thomas Jefferson was dismissed for being improperly brought in Virginia, thus precluding the necessity of reaching any immunity issue. *Livingston v. Jefferson*, 15 Fed. Cas. 660 (No. 8411) (C.C. VA. 1811).

² In its "parade of horrors" and lamentations, the dissents wholly fail to acknowledge why the same perils they fear are not present in the absolute immunity the law has long-recognized for numerous other officials. The dissenting opinions manifest an astonishing blind side in pointing to that old reliable that "no man is above the law." Yet the Court has had no difficulty expanding the absolute immunity of Members of Congress, and in granting absolute immunity to numerous aides of Members. *United States v. Gravel*, 408 U. S. 606 (1972). We have since reaffirmed the absolute immunity for judges, *Stump v. Sparkman*, 435 U. S. 349 (1978), and for prosecutors, *Imbler v. Pachtman*, 424 U. S. 409 (1976), yet the Con-

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

File

CHAMBERS OF
THE CHIEF JUSTICE

(Received late
afternoon on 6/8)

PERSONAL

June 8, 1982

Re: No. 79-1738 - Nixon v. Fitzgerald

Dear Lewis:

I am making a few stylistic changes in my concurring opinion, but adding one that is more than stylistic. It is really the entire point of my concurrence that the immunity is Constitutional. That being so I do not see the basis for any suggestion (your Note 27) that there is any reserved question.

My substantive footnote (N.7) will read as follows, probably on the final page:

"In a footnote the Court suggests that 'we need not address directly' whether Congress could create a damages action against a President. However, once it is established that the Constitution confers absolute immunity, as the Court holds today, legislative action cannot alter that result. Marbury v. Madison, 1 Cranch 137 (1803)."

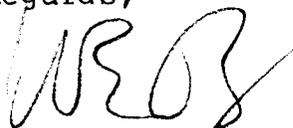
I had thought that was firmly settled law since Marbury v. Madison. In short, Harry has a point at his page 1-2. In other words, there is no question to "reserve."

You could solve this, of course, by omitting Note 27. It is incongruous that a plurality of four "invites" Congress to engage in an obviously futile act of passing a statute unconstitutional on its face.

In short, we ought to "bite the bullet" after all the travail you have borne for two Terms.

I would be glad to discuss.

Regards,



Justice Powell

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

CHAMBERS OF
THE CHIEF JUSTICE

Personal

June 9, 1982

Re: No. 79-1738 - Nixon v. Fitzgerald

Dear Lewis:

The "closing crunch" is always bad and worse this year. But the pressures must not lead us into grave errors of constitutional dimensions. I cannot believe that Bill and Sandra like Note 27, for it significantly undermines the entire holding of this case. For the Court to make a Constitutional holding and then give intimations that Congress -- under some circumstances -- could change it, does even more than undermine the immediate holding. It would inevitably add a new dimension to the now dormant drive in Congress to curtail the Court's jurisdiction. So far as I am concerned Congress can no more alter or modify the basic holding of this case than it can modify or overrule Marbury v. Madison, Brown v. Board of Education, or Nixon v. U.S.. Had the matter remained dormant I could have joined the opinion with a reservation that I did not agree with Footnote 27. But Harry's opinion flushed the point directly. We simply cannot have it both ways. Perhaps the next step is to have a session with the five who are in the majority and see if this can't be hammered out. I will make myself available at any time.

Regards,

WRB

Justice Powell

*I'm sorry this will hold up the case but perhaps we should have a Monday or a Wednesday opinion day from now on
(W).*

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

CHAMBERS OF
THE CHIEF JUSTICE

June 10, 1982

Re: No. 79-1738 - Nixon v. Fitzgerald

Dear Lewis:

I am amending my concurring opinion in this case as follows:

(a) Insert on page 1, after first full paragraph the following:

However, that does not mean a President is "above the law." Nixon v. United States, 418 U.S. 683 (1974). The dissents are very wide of the mark to the extent that they imply that the Court today recognizes a sweeping immunity for a President for all acts. The Court does no such thing. The immunity, as spelled out by the Court today, is limited to decisions and actions within the scope of a President's constitutional and statutory duties. Ante, at 20-22, n. 34. A President, like a Member of Congress, a judge, a prosecutor or a congressional aide, all with absolute immunity, is not immune for acts outside official duties that inflict injury on others. "Straw men" are, of course, more easily toppled than real ones.

(b) Insert on page 5 after line 2 (the final sentence of the opinion), the following:

Far from placing a President "above the law" the Court's holding places a President on essentially the same footing with judges and the other officials whose absolute immunity we have recognized.

(c) Footnote 6, page 5, now reads:

In footnote 27 the Court suggests that "we need not address directly" whether Congress could create a damages action against a President. However, the Court has addressed that issue and resolved it; once it is established that the Constitution confers absolute immunity, as the Court holds today, legislative action cannot alter that result. Nothing in the Court's opinion is to be read as suggesting that a constitutional holding of this Court can be legislatively overruled or modified. Marbury v. Madison, 1 Cranch 137 (1803).

Regards,

Justice Powell



P.S. You can easily trigger a Tuesday release by sending a memo when the full print comes around tomorrow. Or I'd be glad to initiate it



CHANGES AS MARKED:

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: JUN 11 1982

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER *v.*
A. ERNEST FITZGERALD

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

[June —, 1982]

CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion, but I write separately to underscore that the presidential immunity as spelled out today derives from and is mandated by the constitutional doctrine of separation of powers. Indeed, it has been taken for granted for nearly two centuries.¹

However, this does not mean that a President is "above the law." *Nixon v. United States*, 418 U. S. 683 (1974). The dissents are wide of the mark to the extent that they imply that the Court today recognizes sweeping immunity for a President for all acts. The Court does no such thing. The immunity as spelled out by the Court today is limited to decisions and actions *within* the scope of a President's constitutional and statutory duties. *Ante*, at 20-22, n. 34. A President, like a Member of Congress, a judge, a prosecutor, or a congressional aide, all with absolute immunity, is not immune

¹ Presidential immunity for official acts while in office has never been seriously questioned until very recently. *Nixon v. Fitzgerald*, *ante*, at 18-20, n. 31. I can find only one instance in which, prior to our decision in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 338 (1971), a citizen sued a former president for acts committed while in office. A suit against Thomas Jefferson was dismissed for being improperly brought in Virginia, thus precluding the necessity of reaching any immunity issue. *Livingston v. Jefferson*, 15 Fed. Cas. 660 (No. 8411) (C.C. VA. 1811).

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

CHAMBERS OF
THE CHIEF JUSTICE

June 11, 1982

Re: No. 79-1738 - Nixon v. Fitzgerald

MEMORANDUM TO THE CONFERENCE:

I will add to Note 2 page 2 the following:

"75000 public officers have absolute immunity from civil damage suits for acts within the scope of their official function."

Regards,



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

CHAMBERS OF
THE CHIEF JUSTICE

PERSONAL

June 15, 1982

Re: No. 79-1738 - Nixon v. Fitzgerald

Dear Lewis:

I can't conceivably understand why you insist on reviving the issue that, between us, we have blurred. You now emphasize:

We do not suggest that the constitutional arguments supporting Presidential immunity would be diminished in such a case. [i.e., if Congress acted]. Nor do we imply how that balance would be struck. We simply acknowledge that explicit congressional action would confront this Court with a different case.

(A different case yes, but precisely the same result.)

For me this undoes virtually all the reconciling you and I have struggled with for days now. And it is wholly unnecessary since John found my opinion acceptable.

I am unwilling to hedge on this issue as the opinion now does, and Jackson's sole view in Youngstown carries no weight with me. I would not even cite it.

Let Byron "rant" on this point but don't fall into the trap of answering him and rendering the opinion unacceptable to me.

I'm ready to talk if you wish.

Regards,

WRB

Justice Powell

After talking to CJ,
I abandoned this "trial
~~balloon~~ balloon". He thinks
it would undercut his concurrence.

CHANGES AS MARKED:

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: JUN 16 1982

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

**RICHARD NIXON, PETITIONER v.
A. ERNEST FITZGERALD**

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

[June —, 1982]

CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion, but I write separately to underscore that the presidential immunity as spelled out today derives from and is mandated by the constitutional doctrine of separation of powers. Indeed, it has been taken for granted for nearly two centuries.¹

However, this does not mean that a President is "above the law." *Nixon v. United States*, 418 U. S. 683 (1974). The dissents are wide of the mark to the extent that they imply that the Court today recognizes sweeping immunity for a President for all acts. The Court does no such thing. The immunity as spelled out by the Court today is limited to decisions and actions *within* the scope of a President's constitutional and statutory duties. *Ante*, at 20-22, n. 34. A President, like a Member of Congress, a judge, a prosecutor, or a congressional aide—all with absolute immunity—is not im-

¹ Presidential immunity for official acts while in office has never been seriously questioned until very recently. *Nixon v. Fitzgerald*, *ante*, at 18-20, n. 31. I can find only one instance in which, prior to our decision in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 333 (1971), a citizen sued a former president for acts committed while in office. A suit against Thomas Jefferson was dismissed for being improperly brought in Virginia, thus precluding the necessity of reaching any immunity issue. *Livingston v. Jefferson*, 15 Fed. Cas. 660 (No. 8411) (C.C. VA. 1811).

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CHANGES AS MARKED:

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: JUN 22 1982

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

**RICHARD NIXON, PETITIONER v.
A. ERNEST FITZGERALD**

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

[June —, 1982]

CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion, but I write separately to underscore that the presidential immunity derives from and is mandated by the constitutional doctrine of separation of powers. Indeed, it has been taken for granted for nearly two centuries.¹ In reaching this conclusion we do well to bear in mind that the focus must not be simply on the matter of judging individual conduct in a fact-bound setting; rather, in those familiar terms of John Marshall, it is a *Constitution* we are expounding. Constitutional adjudication often bears unpalatable fruit. But the needs of a system of government sometimes must outweigh the right of individuals to collect damages.

It strains the meaning of the words used to say this places a President "above the law." *Nixon v. United States*, 418 U. S. 683 (1974). The dissents are wide of the mark to the

¹Presidential immunity for official acts while in office has never been seriously questioned until very recently. *Nixon v. Fitzgerald*, *ante*, at 18-20, n. 31. I can find only one instance in which, prior to our decision in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 338 (1971), a citizen sued a former president for acts committed while in office. A suit against Thomas Jefferson was dismissed for being improperly brought in Virginia, thus precluding the necessity of reaching any immunity issue. *Livingston v. Jefferson*, 15 Fed. Cas. 660 (No. 8411) (C.C. VA. 1811).

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 27, 1982.

No. 79-1738 -- Nixon v. Fitzgerald.

Dear Byron,

Please join me.

Sincerely,


W. J. B., Jr.

Justice White.
Copies to the Conference.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 1, 1982

RE: No. 79-1738 Nixon v. Fitzgerald

Dear Harry:

Please join me in your dissent in the above.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill".

Justice Blackmun
cc: The Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 22, 1982

Re: 79-1738 - Nixon v. Fitzgerald

Dear Lewis,

I shall file a dissent in this case. It
should be done by the time the ferry goes.

Sincerely yours,



Justice Powell

Copies to the Conference

cpm

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: 11 MAY 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER, *v.*
A. ERNEST FITZGERALD

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

[May —, 1982]

JUSTICE WHITE, dissenting.

The four dissenting members of the Court in *Butz v. Economou*, 438 U. S. 478 (1978), argued that all federal officials are entitled to absolute immunity from suit for any action they take in connection with their official duties. That immunity would extend, even to actions taken with express knowledge that the conduct was clearly contrary to the controlling statute or clearly violative of the Constitution. Fortunately, the majority of the Court rejected that approach: We held that although public officials perform certain functions that entitle them to absolute immunity, the immunity attaches to particular functions—not to particular offices. Officials performing functions for which immunity is not absolute enjoy qualified immunity; they are liable in damages only if their conduct violated well-established law and if they should have realized that their conduct was illegal.

The Court now applies the dissenting view in *Butz* to the office of the President: A President acting within the outer boundaries of what Presidents normally do may, without liability, deliberately cause serious injury to any number of citizens even though he knows his conduct violates a statute or tramples on the constitutional rights of those who are injured. Even if the President in this case ordered Fitzgerald fired by means of a trumped-up reduction in force, knowing

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice White

Stylistic changes throughout;
pp. 5-6, 9, 14-15, 19, 28-29, 31-33

Circulated: _____ 31 MAY 1982
Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER *v.*
A. ERNEST FITZGERALD

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

[June —, 1982]

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To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

_ pp. 6, 9-10, 14, 29 & stylistic _

Circulated: _____

Recirculated: 9 JUN 1982

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER *v.*
A. ERNEST FITZGERALD

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

[June —, 1982]

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 9, 1982

MEMORANDUM TO THE CONFERENCE

Re: 79-1738 - Nixon v. Fitzgerald

In the next circulation, if there is one, or in the final print, I shall note that Justices Brennan, Marshall and Blackmun have joined my dissent in this case.

B.R.W.

P.S. You have probably noted this week's TIME Magazine review of Watergate and its conclusion that the primary lesson of Watergate is that not even the President is above the law. Sour grapes.

B.

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

pp. 1 and 4; Stylistic

Circulated: _____
Recirculated: _____

10 JUN 1982

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER *v.*
A. ERNEST FITZGERALD

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

[June —, 1982]

JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

The four dissenting members of the Court in *Butz v. Economou*, 438 U. S. 478 (1978), argued that all federal officials are entitled to absolute immunity from suit for any action they take in connection with their official duties. That immunity would extend even to actions taken with express knowledge that the conduct was clearly contrary to the controlling statute or clearly violative of the Constitution. Fortunately, the majority of the Court rejected that approach: We held that although public officials perform certain functions that entitle them to absolute immunity, the immunity attaches to particular functions—not to particular offices. Officials performing functions for which immunity is not absolute enjoy qualified immunity; they are liable in damages only if their conduct violated well-established law and if they should have realized that their conduct was illegal.

The Court now applies the dissenting view in *Butz* to the office of the President: A President acting within the outer boundaries of what Presidents normally do may, without liability, deliberately cause serious injury to any number of citizens even though he knows his conduct violates a statute or tramples on the constitutional rights of those who are injured. Even if the President in this case ordered Fitzgerald

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 11, 1982

Re: 79-1738 - Nixon v. Fitzgerald

Dear Lewis,

I shall not be ready in Nixon by
Tuesday.

Sincerely yours,



Justice Powell

Copies to the Conference

cpm

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

- pp. 4-5 and 30

- From: **Justice White**

Circulated: _____

Recirculated: 14 JUN 1982

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER *v.*
A. ERNEST FITZGERALD

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

[June —, 1982]

JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

The four dissenting members of the Court in *Butz v. Economou*, 438 U. S. 478 (1978), argued that all federal officials are entitled to absolute immunity from suit for any action they take in connection with their official duties. That immunity would extend even to actions taken with express knowledge that the conduct was clearly contrary to the controlling statute or clearly violative of the Constitution. Fortunately, the majority of the Court rejected that approach: We held that although public officials perform certain functions that entitle them to absolute immunity, the immunity attaches to particular functions—not to particular offices. Officials performing functions for which immunity is not absolute enjoy qualified immunity; they are liable in damages only if their conduct violated well-established law and if they should have realized that their conduct was illegal.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 14, 1982

MEMORANDUM TO THE CONFERENCE

Re: 79-1738 - Nixon v. Fitzgerald

In response to the Chief Justice's circulation, I am adding the following additional paragraph to footnote on page 4, as well as the indicated additional paragraph to footnote 37:

Add to end of note 2:

Similarly, the Chief Justice, like the majority, misses the point in his repeated, but wholly unconvincing, contention that the Court today does no more than extend to the President the same sort of immunity that we have recognized with respect to Members of Congress, judges, prosecutors, and legislative aides. In none of our previous cases have we extended absolute immunity to all "actions within the scope of [the official's] constitutional and statutory duties." Concurring opinion of the Chief Justice, ante, at 1. Indeed, under the immunity doctrine as it existed prior to today's decision, each of these officials could have been held liable for the kind of claim put forward by Fitzgerald -- a personnel decision allegedly made for unlawful reasons. Although such a decision falls within the scope of an official's duties, it does not fall within the judicial, legislative, or prosecutorial functions to which absolute immunity attaches. The Chief Justice's failure to grasp the difference between the functional approach to absolute immunity that we have previously adopted and the nature of today's decision accounts for his misunderstanding of this dissent.

Add to end of note 37:

Similarly, the Chief Justice dismisses the majority's claim that it has not decided the question of whether Congress could create a damages action against the President: "[T]he Court had addressed that issue and resolved it; once it is established that the Constitution confers absolute immunity, as the Court holds today, legislative action cannot alter that result." Id., at n. 6.



To: The Chief Justice
Justice Brennan
✓Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

- pp. 7, 28 and 30;
stylistic changes throughout -

From: **Justice White**

Circulated: _____

Recirculated: 6/22/82

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER *v.*
A. ERNEST FITZGERALD

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

[June —, 1982]

JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

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The Court now applies the dissenting view in *Butz* to the office of the President: A President acting within the outer boundaries of what Presidents normally do may, without liability, deliberately cause serious injury to any number of citizens even though he knows his conduct violates a statute or tramples on the constitutional rights of those who are injured. Even if the President in this case ordered Fitzgerald

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 12, 1982

Re: No. 79-1738 - Nixon v. Fitzgerald

Dear Byron:

Please join me in your dissent.

Sincerely,

T.M.

T.M.

Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 2, 1982

Re: No. 79-1738 - Nixon v. Fitzgerald

Dear Harry:

I have already joined BRW's dissent. I now join
your dissent.

Sincerely,



T.M.

Justice Blackmun

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Burger
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Blackmun

No. 79-1738 - Nixon v. Fitzgerald

Circulated: MAY 31 1982

Recirculated: _____

JUSTICE BLACKMUN, dissenting.

I join JUSTICE WHITE's dissent. For me, the Court leaves unanswered his unanswerable argument that no man, not even the President of the United States, is absolutely and fully above the law. See United States v. Lee, 106 U.S. 196, 220 (1882),¹ and Marbury v. Madison, 1 Cranch. 137, 163 (1803).² Until today, I had thought this principle was the foundation of our national jurisprudence. It now appears that it is not.

Nor can I understand the Court's holding that the absolute immunity of the President is compelled by separation-of-powers concerns, when the Court at the same time expressly leaves open, ante, at 16, and n. 27, the possibility that the President nevertheless may be fully subject to congressionally-created forms of liability. These two concepts, it seems to me, cannot coexist.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 31, 1982

Re: No. 79-1738 - Nixon v. Fitzgerald

Dear Byron:

Please join me in your dissent.

I am writing a brief separate dissent. This will not hold you or Lewis up, for I suspect that you will be making some revisions in response to Lewis' third draft of May 26.

Sincerely,



Justice White

cc: The Conference

10. The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: _____

Recirculated: JUN 1 1982

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER *v.*
A. ERNEST FITZGERALD

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

[June —, 1982]

JUSTICE BLACKMUN, dissenting.

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¹"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

²"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court."

STYLISTIC CHANGES

4 p. 1

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: _____

Recirculated: JUN 4 1982

2nd PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER *v.*
A. ERNEST FITZGERALD

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

[June —, 1982]

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and
JUSTICE MARSHALL join dissenting.

I join JUSTICE WHITE's dissent. For me, the Court leaves unanswered his unanswerable argument that no man, not even the President of the United States, is absolutely and fully above the law. See *United States v. Lee*, 106 U. S. 196, 220 (1882),¹ and *Marbury v. Madison*, 1 Cranch 137, 163 (1803).² Until today, I had thought this principle was the foundation of our national jurisprudence. It now appears that it is not.

Nor can I understand the Court's holding that the absolute immunity of the President is compelled by separation-of-powers concerns, when the Court at the same time expressly leaves open, *ante*, at 16, and n. 27, the possibility that the President nevertheless may be fully subject to congressio-

¹"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

²"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court."

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 17, 1981

78-1738 Nixon v. Fitzgerald

Dear Chief:

My understanding is that you, Bill Rehnquist and Sandra continue to entertain serious doubt as to whether you would join a disposition of the Nixon case on the cause of action question (sometimes referred to, for brevity, as the Bivens question). Your view is that we took this case in a "collateral issue" context to decide the immunity question, and the three of you continue to have serious reservations as to whether we properly may dispose of the case on a ground neither assigned nor submitted to us under the specified question, in the petition or in the briefs.

Bill Brennan and Harry would DIG the Nixon case. Byron and Thurgood would dispose of it narrowly as a case in which no private cause of action could be implied, limiting the analysis to the special relationship of government employment. John and I prefer to address the cause of action question and would do so broadly along the lines of my Version II memorandum of last spring.

Thus, it is evident that a Court opinion is not assured if each of us remains with our first preference votes. As I view the Nixon case as uniquely requiring a Court opinion, I am now prepared to defer to the wishes of you, Bill Rehnquist and Sandra and prepare a draft opinion holding that a President has absolute immunity from damage suit liability for the reasons stated in my Version I memorandum last spring. John and you both joined that memorandum.

I have discussed the situation with John, and he fully shares the view that a Court opinion in a case involving the liability of a President is important institutionally. John therefore is willing to decide the Nixon case on absolute immunity. John always has had some question as to the effect of an Act of Congress that

expressly provided a damage remedy against a President - as unlikely as such action may be. He may "reserve" on this question in a way that would not prevent a Court opinion.

With five votes now for an absolute immunity resolution of this case - the question submitted on the collateral order - I will draft an opinion this basis.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

February 18, 1982

79-1738 Nixon v. Fitzgerald

Dear John:

Here is a Chambers draft of an opinion. As we have collaborated on this issue for more than a year, I would, of course, appreciate your reviewing the draft before I circulate it.

Although the basic analysis leading to the holding of absolute immunity remains the same, the opinion is different in several respects from ours last Term. First, it is simplified by the absence of the Title III statutory issue that was the centerpiece of Byron's memorandum. Second, as last year's case involved three defendants in addition to the President, I could focus in this case solely on presidential immunity. Finally, I have said explicitly - in view of your reservation - that we were not expressing any view as to presidential immunity if Congress should authorize a damage suit remedy against any President. I would think it very doubtful whether Congress has any such power.

I am writing a separate opinion in the Fitzgerald case, one that I find more troublesome - particularly since there may well be no consensus of views among five Justices. My bottom line in Fitzgerald will be qualified immunity, the view you and I took last Term with respect to Halderman. At Conference, Sandra also indicated a preference for qualified immunity. I would expect the Chief and Bill Rehnquist to go for derivative immunity. I do not know whether Byron and the Justices who voted with him last Term will elect to reach the immunity issue or will hold that there is no cause of action.

It is increasingly clear, contrary to my expectation, that summary judgment motions have not been successful in preventing long drawn out litigation over

insubstantial claims against officials. For example, in addition to the suit pending here, Ed Levi and other Justice Department officials are defendants in several other suits - with the consequent expense and harassment. I therefore think Jerry Gesell is right in urging that when an immunity defense is pled, the burden of proof on that issue should be allocated to the plaintiff.

I know that you are pressed at this time, and I regret not being able to get the Nixon draft to you earlier.

Sincerely,

Justice Stevens

lfp/ss

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: MAR 17 1982

Recirculated: _____

FIRST CIRCULATED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER, v.
A. ERNEST FITZGERALD

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

[March —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The plaintiff in this lawsuit seeks relief in civil damages from a former President of the United States. The claim rests on actions allegedly taken during the former President's tenure in office. The issue before us is the scope of the immunity possessed by the President of the United States.

I

In January 1970 the respondent A. Ernest Fitzgerald lost his job as a management analyst with the Department of the Air Force. Fitzgerald's dismissal occurred in the context of a departmental reorganization and reduction in force, in which his job was eliminated. In announcing the reorganization, the Air Force characterized the action as taken to promote economy and efficiency in the armed forces.

Respondent's discharge attracted unusual attention in Congress and in the press. Fitzgerald had attained national prominence approximately one year earlier, during the waning months of the presidency of Lyndon B. Johnson. On November 13, 1968, Fitzgerald appeared before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress. To the apparent embarrassment of his superiors in the Department of Defense, Fitzgerald testified that cost-overruns on the C-5A

March 18, 1982

PERSONAL

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

Dear Chief:

This is in reply to your personal letter.

As to the sentence on page 24 of Nixon, certainly the press as well as Congress exercises considerable restraint on the conduct of a President. As much as I deplore his means, Woodward's expose of Watergate preceded any action by Congress. I will try, however, to clarify the language.

The second paragraph of your letter puzzles me. You say that if "Harlow becomes the law", the Court will then "literally invite shakedown suits". As I view it, Harlow mirrors present law. As now drafted, its only effect on present law will be to make it more difficult for plaintiffs to win these suits.

Butz v. Economou is now the law. The defendant in that suit was a Cabinet member, and the opinion adopted qualified immunity as the standard applicable to executive officials, except for those performing specially protected functions, such as judges and prosecutors. I joined Butz because it was foreshadowed - if not controlled by - your opinion for the Court in Scheuer v. Rhodes.

You read Gravel more broadly than I ever have. However one reads it, Gravel was decided before both Scheuer and Butz. In sum, rather than make new doctrine, I have simply followed these two well established precedents of this Court.

For the reasons stated in my letter of yesterday to you and Bill Rehnquist, I am proposing a modification in the Wood v. Strickland standard. This seems permissible because necessary to attain the balance contemplated by Butz itself.

I have no idea whether my draft in this case will attract a Court. I do have a rather strong feeling that, from your viewpoint, as I understand it, my draft is likely to be better than any alternative that the Court will adopt.

Sincerely,

The Chief Justice

lfp/ss

— pgs 17, 23, 24

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: MAR 29 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

**RICHARD NIXON, PETITIONER, v.
A. ERNEST FITZGERALD**

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

[March —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The plaintiff in this lawsuit seeks relief in civil damages from a former President of the United States. The claim rests on actions allegedly taken during the former President's tenure in office. The issue before us is the scope of the immunity possessed by the President of the United States.

I

In January 1970 the respondent A. Ernest Fitzgerald lost his job as a management analyst with the Department of the Air Force. Fitzgerald's dismissal occurred in the context of a departmental reorganization and reduction in force, in which his job was eliminated. In announcing the reorganization, the Air Force characterized the action as taken to promote economy and efficiency in the armed forces.

Respondent's discharge attracted unusual attention in Congress and in the press. Fitzgerald had attained national prominence approximately one year earlier, during the waning months of the presidency of Lyndon B. Johnson. On November 13, 1968, Fitzgerald appeared before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress. To the apparent embarrassment of his superiors in the Department of Defense, Fitzgerald testified that cost-overruns on the C-5A

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

May 18, 1982

79-1738 Nixon v. Fitzgerald

Dear Chief, Bill, John and Sandra:

I send to each of you herewith, a third draft of my opinion for the Court, which you have joined.

Byron's dissent, persuasive from his viewpoint, tempted me to respond to a number of points. On reflection, however, I concluded that he had made only two substantial arguments: (i) that in resolving this case, we had to "assume" that there is an implied cause of action against a President under both Bivens and the Civil Service statutes; and (ii) that we relied too heavily on "public policy".

I therefore have confined responses to his opinion almost exclusively to these two points. I think Byron perhaps is correct that I had overemphasized "policy", when the fundamental support for absolute immunity comes from the Constitution, and the structure and history of our government. Changes in the text, marked in the margin of my third draft, have attempted to make this clear.

The "implied cause of action" point is peculiar in the present posture of the case. You may recall that there was a majority (including Byron) to decide this case on the ground that there is no implied cause of action against a President either under Bivens or the statutes. But a majority of you argued that we had taken the case to decide the immunity question, and accordingly I have written it that way. Byron, however, has relied on the statutes in a way that I think both damaging and unjustified. I think it necessary to respond, and I have done so in footnote 27, p. 16.

As indicated above, I am not replying to Byron's "parade of horrors" as to what a President may do to innocent people. I was tempted to cite from some of his own language in Stump v. Sparkman, 435 U.S. 349, 355-356, in

which he quoted from Bradley v. Fisher, 13 Wall 335, at 347. But this seems profitless. My response, therefore, is confined primarily to the foregoing points. I think Byron's criticism with respect to "public policy" was a constructive one. It has helped me, I think, to strengthen the opinion. I hope you agree.

As you have joined, I will await your views before I recirculate.

Sincerely,

The Chief Justice
Justice Rehnquist
Justice Stevens
Justice O'Connor

lfp/ss

Stylistic changes throughout
1, 8, 15-26
Footnotes renumbered

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: *(Only to*
Justice who
Recirculated: *voted*
with me)

THIRD DRAFT

5/19

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER, v.
A. ERNEST FITZGERALD

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

[May —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The plaintiff in this lawsuit seeks relief in civil damages from a former President of the United States. The claim rests on actions allegedly taken in the former President's official capacity during his tenure in office. The issue before us is the scope of the immunity possessed by the President of the United States.

I

In January 1970 the respondent A. Ernest Fitzgerald lost his job as a management analyst with the Department of the Air Force. Fitzgerald's dismissal occurred in the context of a departmental reorganization and reduction in force, in which his job was eliminated. In announcing the reorganization, the Air Force characterized the action as taken to promote economy and efficiency in the armed forces.

Respondent's discharge attracted unusual attention in Congress and in the press. Fitzgerald had attained national prominence approximately one year earlier, during the waning months of the presidency of Lyndon B. Johnson. On November 13, 1968, Fitzgerald appeared before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress. To the apparent embarrassment of his superiors in the Department of De-

Sandra
objected
to u 27,
& other
parts of
opinion
she
previously
had
approved

not
circulated

May 20, 1982

PERSONAL

79-1738 Nixon v. Fitzgerald

Dear Chief, Bill and John:

As a result of discussions with Sandra, I expect to rewrite - and condense - footnote 27 (pp. 16-17) of my third draft sent you on May 19.

This contains changes that seemed appropriate in light of Byron's dissent. As I indicated in my letter of transmittal, note 27 was new. Sandra has made some helpful suggestions.

I suggest, therefore, that you await a change in this that I probably will make, and recirculate.

Sincerely,

The Chief Justice
Justice Rehnquist
Justice Stevens

lfp/ss

cc: Justice O'Connor

May 25, 1982

79-1738 Nixon v. Fitzgerald

Dear Sandra:

I am grateful for your continued interest in this case. The enclosed draft - now ready for circulation - substantially adopts each of the three suggestions made in your letter of May 21.

On pages 21-23 I have "tracked" your draft language almost word-for-word. Footnote 31 now includes the historical discussion we both thought appropriate. In accord with the third paragraph of your letter, the substance of the former note 36 now has been "integrated" into footnote 31.

I believe we now have footnote 27 in satisfactory form. I have accepted your two suggested sentences as explanations of the opinion's approach to the questions presented. Your first sentence begins the footnote. I then have added a few sentences of my own, explaining that the approach is consistent with the Court's prior practice. Your second sentence then provides a kind of summary. The last sentence has been added to make clear that our holding fairly can be called "constitutional" - a matter of great concern to the Chief Justice.

As perhaps you sense, I am anxious to conclude work on this opinion - but only with a Court. Last Term, both Byron and I must have devoted the better part of two months to the question of presidential immunity. We ended up with a 4-4 tie, with WHR not participating. There are differences between the Kissinger case last Term and the present one as a wiretap was involved in it. But the basic question of absolute immunity was the centerpiece of our long debate. Potter, John and I worked directly together in support of the absolute immunity view, that was joined also by the Chief. At one point Thurgood agreed, but in the end

he defected. I think, as does John, that this year's opinion is an improved and stronger exposition of the absolute immunity view for the President of the United States.

I particularly appreciate your interest and support, and your suggestions have been constructive. I very much hope you will renew your join. Certainly as much as any other case this Term, it is necessary to have a solid Court for one opinion.

Although I am ready to recirculate, I want to make sure that the changes have your approval.

Sincerely,

Justice O'Connor

lfp/ss

Stylistic changes throughout
Footnotes renumbered
1,8, 15-25

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: **MAY 25 1982**

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

**RICHARD NIXON, PETITIONER, v.
A. ERNEST FITZGERALD**

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

[May —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The plaintiff in this lawsuit seeks relief in civil damages from a former President of the United States. The claim rests on actions allegedly taken in the former President's official capacity during his tenure in office. The issue before us is the scope of the immunity possessed by the President of the United States.

I

In January 1970 the respondent A. Ernest Fitzgerald lost his job as a management analyst with the Department of the Air Force. Fitzgerald's dismissal occurred in the context of a departmental reorganization and reduction in force, in which his job was eliminated. In announcing the reorganization, the Air Force characterized the action as taken to promote economy and efficiency in the armed forces.

Respondent's discharge attracted unusual attention in Congress and in the press. Fitzgerald had attained national prominence approximately one year earlier, during the waning months of the presidency of Lyndon B. Johnson. On November 13, 1968, Fitzgerald appeared before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress. To the apparent embarrassment of his superiors in the Department of De-

Changes At
14, 16, 18, 19-21, 23-25

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: JUN 3 1982

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER *v.*
A. ERNEST FITZGERALD

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

[June —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The plaintiff in this lawsuit seeks relief in civil damages from a former President of the United States. The claim rests on actions allegedly taken in the former President's official capacity during his tenure in office. The issue before us is the scope of the immunity possessed by the President of the United States.

I

In January 1970 the respondent A. Ernest Fitzgerald lost his job as a management analyst with the Department of the Air Force. Fitzgerald's dismissal occurred in the context of a departmental reorganization and reduction in force, in which his job was eliminated. In announcing the reorganization, the Air Force characterized the action as taken to promote economy and efficiency in the armed forces.

Respondent's discharge attracted unusual attention in Congress and in the press. Fitzgerald had attained national prominence approximately one year earlier, during the waning months of the presidency of Lyndon B. Johnson. On November 13, 1968, Fitzgerald appeared before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress. To the apparent embarrassment of his superiors in the Department of De-

June 8, 1982

79-1738 Nixon v. Fitzgerald

Dear Chief:

I do not believe you have ever expressly joined the Court opinion, although in your letter of March 18 you said:

"In due time I will join you in 79-1738."

As there now appears to be a fair chance of bringing Nixon and Harlow down on Monday, I would like to be sure of your join.

Sincerely,

The Chief Justice

lfp/ss

June 8, 1982

PERSONAL

79-1738 Nixon v. Fitzgerald

Dear Chief:

Thank you for your personal letter, just received. I reply promptly as this case should be ready to come down on Monday - after two long years.

Obtaining and holding four votes for an opinion on this sensitive question has not been easy. Although John has been cooperative throughout, he has insisted from the outset that we expressly leave open the constitutional question that would arise if Congress sought to impose a damages liability on a President. I am confident that he would not join the opinion unless this issue were left open.

Byron complicated the situation when he relied, as he has, on the fact that - in the present posture of the case - we must assume that an implied cause of action exists against the President both under Bivens and the statutes. Thus, I had to address this in my opinion, and working it out with the Justices who had joined me was not easy. Both John and Sandra were concerned, and it was necessary for me to rewrite the note several times. I cannot change it now.

I fully understand your view that Congress has no authority to impose a damages liability on the President. Indeed, I am inclined to agree with you. But the issue is not here, and the probability is that it never will arise. Even if a bill to this effect were adopted by both Houses of Congress, the President surely would veto it. Thus, the situation that concerns us will never arise unless at least two-thirds of both houses wish to create this sort of constitutional crisis.

I am concerned, however, that your absence from the majority opinion may dilute its authority. It will be characterized, of course, as a plurality and one that did not even attract the vote of the Chief Justice. The fact that you may have gone a bit farther than the plurality

still leaves that opinion, with all of its basic analysis, without a majority. A plurality on an issue as inflammatory as this one (see opinions of dissenting judges here and in Harlow), will invite future challenges when the composition of the Court changes.

For these reasons I very much hope you will join the opinion expressly, adding whatever you wish to add in your concurrence. For example, you could, if you wish, join the opinion except only its reservation with respect to affirmative congressional action. If you should do this, I hope you will not refer to Harry's point as to whether there is "anything to reserve". I have had trouble enough holding my "troops" together because of this and related questions.

After two years, we are on the verge of settling - I think for all time - a major constitutional question. But we need the agreement of the Chief Justice of the United States.

Sincerely,

The Chief Justice

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 9, 1982

MEMORANDUM TO THE CONFERENCE

79-1738 Nixon v. Fitzgerald

If we are to continue the two year debate (happily outside of our opinions!), the Time magazine article confirms that, indeed, a President is not above the law. The Nixon Tapes Case and the imminent impeachment resolution, made this clear. I could find nothing in the Time review about private damage suit actions.

L.F.P., Jr.

SS

June 9, 1982

PERSONAL

79-1738 Nixon v. Fitzgerald

Dear Chief:

You will not be surprised that your letter of this afternoon, requiring that we carry this case over, comes as more than a little disappointing - especially as it comes in the "closing crunch" of the Term.

But, of course, any member of this Court has this privilege, and I appreciate that you have reservations about the opinion - although it has been substantially in this form for some time.

In any event, I am agreeable to getting the five of us together to discuss your concern. I hope this can be done on Friday or Monday at the latest.

I assume that at Conference tomorrow you will say simply that you are not ready for Nixon and Harlow to come down.

Sincerely,

The Chief Justice

lfp/ss

1, 16, 19 Stylistic Changes Throughout

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: JUN 10 1962

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER *v.*
A. ERNEST FITZGERALD

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

[June —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The plaintiff in this lawsuit seeks relief in civil damages from a former President of the United States. The claim rests on actions allegedly taken in the former President's official capacity during his tenure in office. The issue before us is the scope of the immunity possessed by the President of the United States.

I

In January 1970 the respondent A. Ernest Fitzgerald lost his job as a management analyst with the Department of the Air Force. Fitzgerald's dismissal occurred in the context of a departmental reorganization and reduction in force, in which his job was eliminated. In announcing the reorganization, the Air Force characterized the action as taken to promote economy and efficiency in the armed forces.

Respondent's discharge attracted unusual attention in Congress and in the press. Fitzgerald had attained national prominence approximately one year earlier, during the waning months of the presidency of Lyndon B. Johnson. On November 13, 1968, Fitzgerald appeared before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress. To the apparent embarrassment of his superiors in the Department of De-

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June 11, 1982

79-1738 Nixon v. Harlow

Dear Chief, Bill, John and Sandra:

First, we welcome the constructive and supportive changes made by the Chief Justice in his concurring opinion.

I now ask your advice. In Byron's latest circulation, his note 2 on page 4 cites Time magazine. This presents a rather tempting "target". What would you think of my adding a note - as enclosed - as a separate paragraph in note 42 at the end of our opinion on page 25?

As we may be able to bring this case down on Tuesday, I would appreciate your thoughts this morning if convenient.

Sincerely,

The Chief Justice
Justice Rehnquist
Justice Stevens
Justice O'Connor

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 11, 1982

79-1738 Nixon v. Fitzgerald

Dear Chief:

As your revised concurring opinion has now been circulated, I write to say that I am ready for the case to come down - provided, of course, the dissenting Justices also are ready.

Is there a possibility that we could do this on Tuesday?

Sincerely,



The Chief Justice

lfp/ss

cc: The Conference

June 14, 1982

Personal

Nixon

Dear Chief:

It might be well to respond to BRW's attempt to distinguish types of immunity on the ground of whether "a personal decision allegedly was made for unlawful reasons".

BRW says this is a kind of claim "put forward by Fitzgerald". Apparently BRW is saying that neither a judge nor prosecutor would have immunity if there were such an allegation. I can scarcely believe he is serious. Prosecutors, in particular, make personal decisions every day as to whom they will prosecute and who knows whether their reasons would be viewed as lawful if immunity turned on this! The same can be said as to judicial decisions, particularly in close cases involving personal judgments as to morality, what will be popular with the public when a judge is facing reelection, and the like.

If Nixon ordered Fitzgerald to be fired as part of personnel changes in the Defense Department, this clearly was within his Executive authority.

BRW states that you "fail to grasp [this] difference". He deserves a response, and I hope you will give him one.

Perhaps the library could find for you a case involving the prosecutor in New Orleans who was so controversial. His name was Garrison. I think we had a cert petition filed here by one of his victims who made a strong case that he had been prosecuted purely for vindictive and personal reasons.

If you elect to answer BRW, I may add a sentence at the end of the final footnote in the Court opinion making a cross reference to your response to the dissenters argument that we are elevating the President "above the law".

Sincerely,

The Chief Justice
LFP/vde

June 14, 1982

Personal

79-1738 Nixon

Dear Chief:

I must correct my letter delivered to you earlier, as I had misread one word in Byron's opinion. He used "personnel" rather than "personal". The mountain of material that we have to read induces mistakes!

You had a better perception of what Byron was saying. He overlooks the central point that the President, vested by the Constitution with the authority of the Executive Branch of government, certainly has jurisdiction over personnel matters. The scope of authority of judges and prosecutors is more limited than that of a President. Yet all three possess absolute immunity only when they act within their authority.

Sincerely,

The Chief Justice

LFP/vde

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 15, 1982

79-1738 Nixon v. Fitzgerald

Dear Chief, Bill, John and Sandra,

In view of Byron's additions on pages 4-5 and 30 of his opinion, and the fact that this case now will not come down until next week, I no longer can resist the temptation to respond.

One of my proposed notes addresses specifically Byron's reliance on Time magazine in his "eye-catching" note 2.

The second suggested addition is a response primarily to Harry's statement that our opinion is internally contradictory. Again, possible misunderstanding here could be clarified, by emphasizing the parallel with the Court's decision - and its rationale - in United States v. Nixon.

If you approve, I will add these notes to what I hope will be a final circulated draft.

I am grateful to each of you for "staying with me" during this long (and now boring!) process.

Sincerely,



The Chief Justice
Justice Rehnquist
Justice Stevens
Justice O'Connor

lfp/ss

*The C of "hit the ceiling"
on Nixon!*

No. 79-1738, Nixon v. Fitzgerald
For insertion as a footnote on page 23, to be dropped from
the citation in text to U.S. v. Nixon.

In his dissenting opinion, post, at 1, Justice BLACKMUN states he cannot "understand the Court's holding that the absolute immunity of the President is compelled by separation-of-powers concerns, when the Court at the same time expressly leaves open ... the possibility that the President nevertheless may be fully subject to congressionally-created forms of liability." The two concepts, he contends, "cannot coexist." Id., at 2. Justice BLACKMUN's argument misapprehends the balancing approach to separation-of-powers questions prescribed by such cases as Nixon v. General Services Administration, 433 U.S. 425, 443 (1977) and United States v. Nixon, 418 U.S. 683, 703-713 (1974). In the Nixon Tapes Case, for example, the Court stated that the Constitution mandated judicial recognition of an evidentiary privilege protecting the communications of the President of the United States. In language similar to that used today to describe the President's absolute immunity, we characterized that evidentiary privilege as "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." 418 U.S., at 708. Nonetheless, despite finding that the privilege was

constitutionally mandated, we held that other factors of constitutional weight could be so compelling as to overcome the privilege in a particular case. Our reservation in this case is consistent with this balancing approach. It acknowledges that action by Congress might be considered a factor of constitutional weight, which might require the Court to reexamine the balance on the constitutional scale. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring). We do not suggest that the constitutional arguments supporting Presidential immunity would be diminished in such a case. Nor do we imply how the balance then would be struck. We simply acknowledge that explicit congressional action would confront this Court with a different case.

Iranian Assets case - not 1980

Possible Rider to Footnote 42, page 25.

Reaching for authority to support the dissenting position, Justice WHITE purports to derive support from a current edition of Time magazine. ^{See n 2 post} But the issue that he quotes does no more than report the unremarkable proposition, with which we are in full agreement, that the President is not above the law. This unusual source thus would provide legal support for the dissent only if Time should share the dissent's persistent error--that of confusing immunity from damages liability with being "above the law." The Time article of course made no reference to damages liability. Rather, its statement ^{relied on} referred to the judgment of this Court in the Nixon tapes case and of the House Judiciary Committee in voting an impeachment resolution. The President's continuing amenability to these forms of legal process demonstrates that the President remains as much subject to the law today as ever before. The immunity ^{we} recognized ~~today~~ extends only to private suits for damages based on decisions and actions within the scope of a President's authority.

Deck - did Time mention
Tapes Case & House Committee?

~~unusual source~~ - 0

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 16, 1982

Dear Byron:

In taking a last look at my Nixon draft, it seems to me that the opinion is "heavier" on footnotes than I ordinarily would like an opinion to be.

Would it inconvenience you if I were to move Footnote 34 to text? I would propose simply to elevate the note-- without any substantive changes--to text, probably under a subhead "C," at the end of the the last sentence on page 23.

Sincerely,

Lewis

Justice White

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 16, 1982

79-1738 Nixon v. Fitzgerald

MEMORANDUM TO THE CONFERENCE:

I propose to add the attached paragraph at the end of footnote 42 on page 25 of the Court's opinion.

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.

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Sincerely,

Lewis

Justice White

lfp/ss

cc: The Conference

6, 23-24, and stylistic
Footnote 34 moved to text
on page 23
Minor changes are marked

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: _____

6
th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER *v.*
A. ERNEST FITZGERALD

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

[June —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The plaintiff in this lawsuit seeks relief in civil damages from a former President of the United States. The claim rests on actions allegedly taken in the former President's official capacity during his tenure in office. The issue before us is the scope of the immunity possessed by the President of the United States.

I

In January 1970 the respondent A. Ernest Fitzgerald lost his job as a management analyst with the Department of the Air Force. Fitzgerald's dismissal occurred in the context of a departmental reorganization and reduction in force, in which his job was eliminated. In announcing the reorganization, the Air Force characterized the action as taken to promote economy and efficiency in the armed forces.

Respondent's discharge attracted unusual attention in Congress and in the press. Fitzgerald had attained national prominence approximately one year earlier, during the waning months of the presidency of Lyndon B. Johnson. On November 13, 1968, Fitzgerald appeared before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress. To the evident embarrassment of his superiors in the Department of De-

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Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 23, 1982

Memorandum to the Conference

Cases Held for No. 79-1738, Nixon v. Fitzgerald, or
No. 80-945, Harlow v. Fitzgerald

No. 81-469, Bush v. Lucas

In 1975, while working for NASA, the petitioner criticized the management of his branch of the NASA program. An adverse personnel action ensued, and petitioner suffered a demotion. Following an initial denial of administrative relief, petitioner ultimately won reinstatement and back pay from the Civil Service Commission. In the meantime, however, he had instituted this damages action against respondent, his administrative superior. The suit alleged a conspiracy to deprive petitioner of First Amendment rights. The district court summarily dismissed the action, and CA5 affirmed on the ground that Congress had provided an alternative remedy under the Civil Service Act. This Court then vacated and remanded for reconsideration in light of Carlson v. Green, 446 U.S. 14 (1980). 446 U.S. 914. On the remand CA5 reaffirmed the decision to grant summary judgment. This time it found that "the unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a Bivens remedy in the absence of affirmative congressional action." The panel also noted that inferring a Bivens remedy might encourage employees to bypass congressionally created administrative remedies in favor of judicial relief.

The petitioners in No. 80-945, Harlow v. Fitzgerald, also argued that the respondent's capacity as a government employee represented a "special factor" defeating his claim to a Bivens cause of action under the First Amendment. But the Court did not reach that issue in Harlow. Nor would the circulating opinion in No. 80-1074, Velde v. National Black Police Assn., necessarily be dispositive. The four-member majority in that case relies on a cumulation of factors not all present here.

June 24, 1982

Nixon and Harlow

Dear John,

This is merely to say "thank you" with warmth and appreciation.

You were a helpful and steadfast supporter through two long Terms of struggle with these cases.

As ever,

Justice Stevens

lfp/ss

August 24, 1981

Subject: Fitzgerald Cases

Dear Chief,

As you will remember, these two cases present most of the immunity issues that were before us in Kissinger.

When we granted them in June, I believe we planned on having them set in October so that there would be a chance to decide them before the Kissinger case is tried by the District Court.

To avoid another 4/4 split, it is essential that we have a full Court. I understand that Judge O'Connor's confirmation hearing commences about September 9. If she is confirmed promptly, as I would expect, she should be ready to participate in the October cases.

However, in view of the complexity of the issues (the memos that Byron and I circulated totalled almost 100 pages!), it may be desirable to defer the Fitzgerald cases until November. This would assure that Judge O'Connor has an opportunity to prepare herself.

Sincerely,

The Chief Justice
Supreme Court of the United States
1 First Street, N. E.
Washington, D. C. 20543

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 18, 1982

Re: No. 79-1738 Nixon v. Fitzgerald

Dear Lewis:

I am fully sensible of the considerations mentioned in your letter of transmittal to me and the Chief, and shall make every effort to join your opinion in this case. So long as Butz v. Economu is on the books, I don't see how you can be faulted for relying on it. I agree with the basic thrust of your opinion, and think you have done an excellent job in disposing of the case. The few suggestions I am about to make do not seem to me, and I hope they do not seem to you, to suggest any major (or even minor) alteration in the structure of the opinion.

My concerns are these:

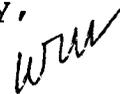
(1) Page 17, sixth line from the bottom: You describe one of the functions of the President as "the administration of justice." I don't know that any great damage would be done by leaving that as is, but it seems to me that the "administration of justice" is more the function of the courts under Article III than it is of the President. I think the opinion would be improved if you could see your way clear to change that phrase to something like "law-enforcement."

(2) Page 19, fn. 35: You state in the third paragraph of this footnote, on page 20, that the absolute immunity accorded the President should extend to "acts within the 'outer perimeter' of the area of his official responsibility." Since in the final paragraph of the footnote you conclude that the acts he performed "lay well within the outer perimeter of his authority," I would prefer to see the Court reserve judgment on the question of how far the President's absolute immunity extends. Since you conclude, correctly, in my opinion, that he meets the definition laid down in Barr v. Matteo, I should think the

discussion could be phrased in terms of an assumption that the President's immunity extends at least to the outer perimeter, and a conclusion that under this assumption the test is satisfied in this case.

(3) Page 23, carry-over sentence: You state that "Presidents may be prosecuted criminally, at least after they leave office." While this may well be correct, it seems to me there is absolutely no necessity for saying so in this case; it is not an issue here, and so far as I know the Court has never so held. The language from Story's Commentaries, which you quote in fn. 33 on page 19, speaks of the person of the President possessing an "official inviolability" "in civil cases at least." This would seem to indicate that at least in Story's mind, the question was an open one. I see no need to salve the wounds of the losing view in this case by throwing them a bone which may come back to haunt us.

Sincerely,



Justice Powell

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

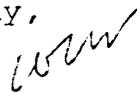
April 5, 1982

Re: No. 79-1738 Nixon v. Fitzgerald

Dear Lewis:

Please join me in the most recent circulation of your proposed opinion.

Sincerely,



Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 16, 1982

79-1738 Nixon v. Fitzgerald

MEMORANDUM TO THE CONFERENCE:

I propose to add the attached paragraph at the end of footnote 42 on page 25 of the Court's opinion.

L. F. P.
L.F.P., Jr.

SS

Lewis - I strongly object to any footnote which suggests that a statement from Time magazine merits any discussion in an opinion such as yours. Time's statements may be important in a libel action - apart from that, I would not so dignify them.

Wm

lfp/ss 06/16/82

79-1738, Nixon v. Fitzgerald

For addition at the end of footnote 42, p.25.

Reaching for authority to support the dissenting position, Justice WHITE purports to derive support from a recent edition of Time magazine. But the issue that he quotes does no more than report the unremarkable proposition, with which we are in full agreement, that the President is not above the law. This unusual source thus would provide legal support for the dissent only if Time should share the dissent's persistent error--that of confusing immunity from damages liability with being "above the law." The Time article of course made no reference to damages liability for official acts. Rather, its statement referred to the judgment of this Court in the Nixon tapes case and of the House Judiciary Committee in voting an impeachment resolution. The President's continuing amenability to these forms of legal process demonstrates that the President remains as much subject to the law today as ever before. The immunity recognized today extends only to private suits for damages based on decisions and actions within the scope of a President's authority.

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

file

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 22, 1982

Re: 79-1738 - Nixon v. Fitzgerald

Dear Lewis:

For the most part I think your draft opinion is excellent and I am sure I will join it. I do, however, have one concern that perhaps is nothing more than style but I think may have sufficient importance to discuss with you. At several points in the opinion, at pages 14 through 18, you describe the Executive's immunity as something that is granted by the Court rather than provided by the law. I would be much more comfortable if you could make language changes which I can illustrate by reference to the last few lines on page 14. Instead of stating that federal officials "should be accorded" absolute immunity, could we not say that they "have a right" to absolute immunity. Similarly, instead of a "blanket grant" of absolute immunity, could we not refer to a "blanket recognition." Again, three lines from the bottom, instead of "we extended to federal officials the same qualified immunity we had granted to state officials" could we perhaps say something like "we held that federal officials have the same qualified immunity as state officials."

I am also a little troubled by stating at the top of page 16 that we followed the tradition of common law courts "by freely weighing considerations of public policy." I do not have a specific language change to suggest there, but could it not appropriately be phrased in terms of the Court having relied on considerations of public policy comparable to those that had traditionally been recognized by common law courts, or something similar?

Perhaps this is just a flyspeck, but on page 17, in line 4, I wonder why you say "acts in office" instead of "official acts."

Finally, in the second line on page 18, would it be sufficient to have "recognized immunity of this scope for governors" instead of having "granted" immunity.

In a realistic sense, perhaps your opinion is entirely correct in referring to grants of immunity by judges, but I feel much more comfortable when I am able to say that we are merely applying the law as we understand it to exist independently of the composition of the Court. I think it is especially important to take that approach when the Court is as closely divided as it is on the issue in this case.

Except for these language changes, I really think your opinion is excellent.

Respectfully,

A handwritten signature in cursive script, appearing to be 'J. Powell', written in dark ink.

Justice Powell

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 18, 1982

Re: 79-1738 - Nixon v. Fitzgerald

Dear Lewis:

Please join me.

Respectfully,



Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 29, 1982

No. 79-1738 Nixon v. Fitzgerald

Dear Lewis,

Please join me.

Sincerely,



Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 19, 1982

No. 79-1738 Nixon v. Fitzgerald

Dear Lewis,

Thank you for the opportunity to review your proposed changes in the Court's opinion. It is a major opinion, and a very significant one. You have tackled it well.

I am concerned, however, about two major points. In footnote 27, the opinion seems to say that there are neither statutory nor First Amendment implied causes of action. However, if this is so, there is no need to reach the immunity issue. As you know, my first preference was to hold there is no implied cause of action. It seems to me the Court must make up its mind which issue to reach, but if we hold there is no implied cause of action, the rest is dicta.

Second, if we hold the President enjoys absolute immunity from damage suits, then we are holding in effect that Congress may not enact a statute holding the President liable for civil damages. There is no express discussion, however, of the limitation we are imposing on Congress. Inasmuch as the President is subject to subpoena duces tecum in a criminal case, and has been held subject to injunction, there should be a clearer discussion of why Congress is restricted in this one regard, and the extent to which it is restricted.

Finally, you have opted not to expand the historical analysis. Byron made some good points in that regard and perhaps it would help the opinion to deal with it more fully.

Sincerely,

Sandra

Justice Powell

cc: The Chief Justice
Justice Rehnquist
Justice Stevens

*We
must
have
public
discuss
issue*

*Respectfully,
under 2/1/81
& Jefferson
subweight
State...
...
...*

*P22-24
u40*

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

File

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 21, 1982

Re: No. 79-1738 Nixon v. Fitzgerald

Dear Lewis,

In view of the importance of this opinion, I have continued to work at it in light of the concerns I expressed previously. Perhaps it would be possible to condense footnote 27 even more so as to avoid some of the anomaly resulting from extending absolute immunity and also finding no implied cause of action. A suggestion is attached for your consideration.

With reference to my concern about the matter of other exercises of jurisdiction over the President, I am attaching a suggested substitution of Section IV B, pages 21-24. The purpose of the substitution is my concern that the present section could confuse the reader regarding the courts' exercise of jurisdiction over the President. My suggested changes attempt to make clear that we are not subtly altering our past decisions.

In addition to the changes in the text, I suggest dropping footnotes 35 and 37. The citations in the first footnote are dated and may be of limited value in light of Youngstown. The references in the second footnote are not needed because of references to Youngstown in the text. Because of the direct reference to United States v. Nixon in the text, I would delete the first sentence (and citation) in footnote 40. Finally, I suggest integrating the substance of footnote 36 with your historical discussion in footnote 31.

I stand ready to discuss this further if it would be helpful. This "end of term" drafting is not easy.

Sincerely,

Sandra

Sandra D. O'Connor

Attachment

Deck.
How much
of what she
now objects
to is in our
first draft
that she joined
- or did she
uniquely -
& that others
have joined.

27. In the present case, therefore, we are presented only with implied causes of action, and we do not address directly the immunity issue in the context of express causes of action against the President. Consequently, our holding today extends to the President absolute immunity from civil damages liability in the absence of explicit affirmative action by Congress.

pp. 21-24

-B-

Courts traditionally have recognized the President's constitutional responsibilities and status as factors counselling judicial deference and restraint. For example, while courts generally have looked to the common law to determine the scope of an official's evidentiary privilege, [n. 38] in considering such claims by the President, we have recognized that presidential immunity is "rooted in the separation of powers under the Constitution." United States v. Nixon, 418 U.S. 683, 708 (1974).

It is settled law that the separation of powers doctrine does not bar every exercise of jurisdiction over the President of the United States. See, e.g., United States v. Nixon, *supra* (holding that under most circumstances the President must produce materials subpoenaed for use in a criminal trial); United States v. Burr, 25 Fed. Cases 187, 191 (1807) (ordering the President to produce a letter subpoenaed for use in a criminal trial); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952) (holding invalid a presidential order to seize property because it was not authorized by either Congress or the Constitution). [n. 39] But in deciding to exercise jurisdiction, a court must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the executive branch. See Nixon v. General Services Administration, 433 U.S. 425, 443 (1977); United States v. Nixon, 418 U.S. 683, 703-713 (1974). When judicial action is needed to serve broad public interests--as when the Court acts to maintain the proper balance of the separation of powers cf., Youngstown Sheet & Tube Co. v. Sawyer, *supra*, or to ensure that a criminal trial may proceed, United States v. Nixon, *supra*--the exercise of jurisdiction is warranted. In the case of this merely private suit for damages based on a President's official acts, we hold it is not. [n. 40]

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

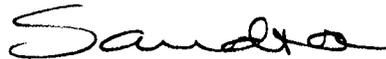
May 26, 1982

Re: No. 79-1738 Nixon v. Fitzgerald

Dear Lewis,

In my view, you have strengthened and improved the opinion in this important case. I gladly continue to join it. I fear I have added to your burdens with the suggestions. Thank you for all the consideration you have shown.

Sincerely,



Justice Powell

P.S. On page 16 in footnote 27, second sentence from the end, I believe the word "immunity" may be a typographical error. Should it be "immune"?

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89-2343

December 2, 1981

Honorable Alexander L. Stevas
Clerk of the United States
Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

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

Dear Mr. Stevas:

This letter is submitted to clarify a response which I gave on Monday, November 30, to a question from Justice O'Connor during oral argument in the above-referenced case. I had intended to offer this clarification during my rebuttal, but did not have a rebuttal opportunity.

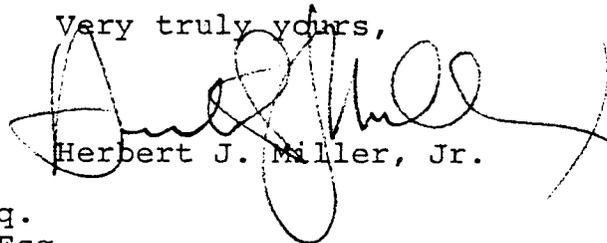
Justice O'Connor inquired whether, under the liability limitation agreement between Mr. Nixon and Mr. Fitzgerald, there would be any adjudication of the facts in the court below following the decision in this Court. My reply was that there would not be any further adjudication of the facts. I meant, thereby, that there would be no trial on the merits of the respondent's complaint irrespective of how the Court decides the case. However, the agreement does contemplate further proceedings below, including such additional adjudication of facts and the application of the law to the facts as are appropriate in light of this Court's decision. For example, were this Court to issue an opinion setting forth the standard for determining whether a President's actions are within the outer perimeter of his duties, this could require the district court, on remand,

Honorable Alexander L. Stevas
December 2, 1981
Page Two

to determine either that the record as it now stands establishes that Mr. Nixon's actions satisfied or failed to satisfy that standard, or that the evidence adduced thus far is in dispute and that a trial is required to resolve the factual issue. The effect of the agreement's limitation is that any such further adjudication of facts must be based upon the existing record. In other words, if any factual issues remain outstanding following this Court's decision, and such issues cannot be resolved on the current state of the voluminous record (thereby necessitating either additional discovery or a trial), Mr. Nixon's obligation to pay \$28,000 ripens. Such payment will be accepted by the respondent in lieu of added liability, and the case will be dismissed.

I am providing sufficient copies of this letter for distribution to the Court and request that you make that distribution.

Very truly yours,



Herbert J. Miller, Jr.

cc: John E. Nolan, Jr., Esq.
Elliot L. Richardson, Esq.
Rex E. Lee, Esquire
William H. Mellor, III, Esq.
Louis Allan Clark, Esquire
John C. Armor, Esquire
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 79-1738

RICHARD NIXON,
Petitioner,

v.

A. ERNEST FITZGERALD,
Respondent.

JOINT STATEMENT OF THE PARTIES

Petitioner Richard Nixon and respondent A. Ernest Fitzgerald, by their undersigned counsel, jointly submit this statement to inform the Court concerning certain matters that have been the subject of erroneous news reports, which may have come to this Court's attention, and which concern the status of this case. The parties have learned that, following the announcement of this Court's May 19, 1980, action granting the petition for writ of certiorari in Halperin v. Kissinger, No. 79-880, some news agencies speculated that the instant action had been settled. This is incorrect. The parties continue vigorously to dispute whether the petitioner can be held liable to respondent in this case, a question presented

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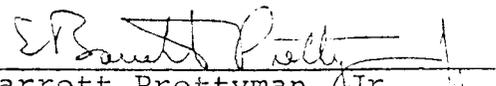
to this Court by the instant petition. The parties have agreed at this stage to fix the amount of payments to which respondent would be entitled in this case, but the amount of payment depends upon this Court's disposition of the instant petition and subsequent proceedings in the District Court. Therefore, the case has not been settled and is not moot.

Respectfully submitted,


R. Stan Mortenson

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