# The Burger Court Opinion Writing Database

## *Harlow v. Fitzgerald*

457 U.S. 800 (1982)

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




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

From: **The Chief Justice**

Circulated: MAR 30 1982

Recirculated: _____

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 80–945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS *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 Dissent, CHIEF JUSTICE BURGER.

The Court today decides in *Nixon* v. *Fitzgerald*, No. 79–1738, what has been taken for granted for 190 years but not explicitly decided by this Court: it is implicit in the Constitution that a President of the United States has absolute immunity from civil suits arising out of official acts. *Nixon* v. *Fitzgerald*, *ante*, at 17. I agree fully that absolute immunity for official acts of the President is, like Executive Privilege, "fundamental to the operation of Government and inextricably rooted in the separation of powers under the constitution." *United States* v. *Nixon*, 418 U. S. 683, 708 (1974).[1]

In this case the Court decides that senior aides of a President do not have the same immunity as the President. I am at a loss, however, to reconcile this conclusion with our holding in *Gravel* v. *United States*, 408 U. S. 616 (1972). In

[1] Presidential immunity for official acts while in office has never been seriously questioned until the last 10 years. *Nixon* v. *Fitzgerald*, *ante*, at 21, n. 36. 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).

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

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1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 80–945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS, *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, dissenting.

The Court today decides in *Nixon* v. *Fitzgerald*, No. 79–1738, what has been taken for granted for 190 years, during which time there was no occasion for this Court to resolve the question: It is implicit in the Constitution that a President of the United States has absolute immunity from civil suits arising out of official acts. *Nixon* v. *Fitzgerald*, *ante*, at 17. I agree fully that absolute immunity for official acts of the President is, like Executive Privilege, "fundamental to the operation of Government and inextricably rooted in the separation of powers under the constitution." *United States* v. *Nixon*, 418 U. S. 683, 708 (1974).[1]

In this case the Court decides that senior aides of a President do not have the same immunity as the President. I am at a loss, however, to reconcile this conclusion with our holding in *Gravel* v. *United States*, 408 U. S. 606 (1972). The

[1] Presidential immunity for official acts while in office has never been seriously questioned until very recently. *Nixon* v. *Fitzgerald*, *ante*, at 21, n. 36. 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).

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. 80–945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS *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, dissenting.

The Court today decides in *Nixon* v. *Fitzgerald*, No. 79–1738, what has been taken for granted for 190 years, that it is implicit in the Constitution that a President of the United States has absolute immunity from civil suits arising out of official acts as Chief Executive. *Nixon* v. *Fitzgerald*, *ante*, at 16–17. I agree fully that absolute immunity for official acts of the President is, like Executive Privilege, "fundamental to the operation of Government and inextricably rooted in the separation of powers under the constitution." *United States* v. *Nixon*, 418 U. S. 683, 708 (1974).[1]

In this case the Court decides that senior aides of a President do not have derivative immunity from the President. I am at a loss, however, to reconcile this conclusion with our holding in *Gravel* v. *United States*, 408 U. S. 606 (1972).

[1] As I noted in *Nixon* v. *Fitzgerald*, *ante*, 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).

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

CHANGES AS MARKED

From: **The Chief Justice**

Circulated: _____

Recirculated: JUN 11 1982

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 80–945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS *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, dissenting.

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In this case the Court decides that senior aides of a President do not have derivative immunity from the President. I am at a loss, however, to reconcile this conclusion with our holding in *Gravel* v. *United States*, 408 U. S. 606 (1972). The Court reads *Butz* v. *Economou*, 438 U. S. 478 (1978), as resolving that question; I do not. *Butz* is clearly distinguishable.[2]

[1] As I noted in *Nixon* v. *Fitzgerald*, *ante*, Presidential immunity for official acts while in office has never been seriously questioned until very recently. See *ante*, at 1, n. 1 (CHIEF JUSTICE BURGER concurring).

[2] If indeed there is an irreconcilable conflict between *Gravel*, *supra*, and

STYLISTIC 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. 80–945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS *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, dissenting.

The Court today decides in *Nixon* v. *Fitzgerald*, No. 79–1738, what has been taken for granted for 190 years, that it is implicit in the Constitution that a President of the United States has absolute immunity from civil suits arising out of official acts as Chief Executive. I agree fully that absolute immunity for official acts of the President is, like Executive Privilege, "fundamental to the operation of Government and inextricably rooted in the separation of powers under the constitution." *United States* v. *Nixon*, 418 U. S. 683, 708 (1974).[1]

In this case the Court decides that senior aides of a President do not have derivative immunity from the President. I am at a loss, however, to reconcile this conclusion with our holding in *Gravel* v. *United States*, 408 U. S. 606 (1972). The Court reads *Butz* v. *Economou*, 438 U. S. 478 (1978), as resolving that question; I do not. *Butz* is clearly distinguishable.[2]

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[1] As I noted in *Nixon* v. *Fitzgerald*, *ante*, Presidential immunity for official acts while in office has never been seriously questioned until very recently. See *ante*, at 1, n. 1 (CHIEF JUSTICE BURGER concurring).

[2] If indeed there is an irreconcilable conflict between *Gravel*, *supra*, and

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 19, 1982.

No. 80-945 -- Harlow & Butterfield v. Fitzgerald.

Dear Lewis,

I am still unsettled in this case. Your draft of course effects a substantial change from the standard adhered to in Scheuer v. Rhodes, Wood v. Strickland, and Butz v. Economou, in which we recognized a "good faith" defense that incorporates both objective and subjective elements. But I am inclined to agree with you that "substantial costs attend the litigation of the subjective good faith of high officials of the Executive Branch." Draft at 15-16. At the same time, however, I am troubled by several points in your draft.

(1) You limit the benefit of the new, objective standard to "high executive officials," at least for the time being. Draft at 18. I do not think that I could join in such a limitation, because it appears to be favoring high officials over their subordinates -- an approach of doubtful symbolic value at best. Indeed, I would have thought it arguable that high government officials, since they have greater resources and legal advice available to them, should be held to a higher standard of behavior. All in all, the whole issue of differential treatment according to hierarchical status would be better avoided, in my view. And it seems to me that this is easy to do, since we have already recognized (as you observe in footnote 29) that qualified immunity is of "varying scope ... dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." Scheuer v. Rhodes, 416 U.S., at 247. In sum, if we are to reformulate the good

faith immunity doctrine, should we not announce a rule applicable across the board, subject to the Scheuer limitation noted above?

(2) You have defined the new substantive standard of liability to be objective in the sense that an official's "qualified immunity would be defeated if [he] "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff]." Draft at 14 (emphasis yours). You persuade me that, at least with respect to constitutional actions having no ready common-law analogue (e. g., false arrest, imprisonment), a "malicious intention to cause ... injury," ibid. (emphasis yours), is an anomalous basis upon which to rest personal liability: To my mind, the relevant intent inquiry should focus on the official's attentiveness to ascertainable law, on what the official "knew or should have known." Therefore I am willing to accept your view that personal liability should not be imposed upon an official who reasonably believes his conduct to be lawful. And sometimes the law is simply too obscure for us to expect it to be known even to an official who is attentive to the responsibilities of his office. Where the law is thus unsettled, the official ought not to be culpable if he exercises his best judgment.

But while I can travel that far with you, I am troubled by your use of the term, "indisputable legal rights." True, that wording appears in Wood v. Strickland and other opinions. But am I not right that every action may be the subject of some legal dispute? And of course every case may be distinguishable, if only on its facts. Thus even when the law on a point is apparently settled, the question of good faith turns on whether the official has attempted to ascertain that law, and whether his actions were taken in accordance with a colorable view of it. I do not think that we are far apart on this point, but I do fear that "indisputable law" sends out quite the wrong signal. I would feel more comfortable if the references, in outlining the substantive standard, were to refer to "ascertainable law," or simply "the law." Of course, under this standard summary judgment would still be readily available to public-official defendants in two very common

situations: (a) where the state of the law was ambiguous at the time of the alleged violation -- so that the law could not have been "known" then, and thus liability could not ensue -- and (b) where the plaintiff cannot prove, as a threshold matter, that a violation of his constitutional rights actually occurred.

(3) Given the substantive standard that you announce -- imposing liability when the public-official defendant "knew or should have known" of the constitutionally violative effect of his actions -- it seems inescapable to me that some discovery may sometimes be required to determine exactly what the defendant did "know" at the time of his actions. In this respect the issue before us is very similar to that in Herbert v. Lando, 441 U.S. 153 (1979), in which the Court observed that "To erect an impenetrable barrier to the plaintiff's use of such evidence on his side of the case is a matter of some substance, particularly when defendants themselves are prone to assert their good-faith ... ." Id., at 170. I think that the possibility of such discovery needs to be acknowledged, if only in a footnote sentence with a comparing reference to Lando. Of course, it could also be noted at that juncture that summary judgment procedures could be arranged so as to allow public-official defendants an opportunity to gain summary judgment in their favor on grounds such as those outlined in the previous paragraph, before discovery of the defendants' "knowledge" would be permitted. Cf. id., at 180, n. 4 (POWELL, J., concurring).

Sincerely,

W. J. B., Jr.

Justice Powell.
Copies to the Conference.

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

From: **Justice Brennan**

Circulated: 27 May 1982

Recirculated: _____

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 80-945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS *v.* A. ERNEST FITZGERALD

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

[May ——, 1982]

JUSTICE BRENNAN, concurring.

I agree with the substantive standard announced by the Court today, imposing liability when a public-official defendant "knew or should have known" of the constitutionally violative effect of his actions. *Ante*, at 15, 18. I also agree that this standard applies "across the board," to all "government officials performing discretionary functions." *Id.*, at 17. I write separately only to note that given this standard, it seems inescapable to me that some measure of discovery may sometimes be required to determine exactly what a public-official defendant did "know" at the time of his actions. In this respect the issue before us is very similar to that addressed in *Herbert* v. *Lando*, 441 U. S. 153 (1979), in which the Court observed that "To erect an impenetrable barrier to the plaintiff's use of such evidence on his side of the case is a matter of some substance, particularly when defendants themselves are prone to assert their good-faith . . . ." *Id.*, at 170. Of course, as the Court has already noted, *ante*, at 18, summary judgment will be readily available to public-official defendants whenever the state of the law was so ambiguous at the time of the alleged violation that it could not have been "known" then, and thus liability could not ensue. In my view, summary judgment will also be readily available whenever the plaintiff cannot prove, as a threshold matter,

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 28, 1982.

No. 80-945 -- Harlow and Butterfield
v. Fitzgerald.

Dear Lewis,

In case it was not clear from my circulation of yesterday, I join in your draft of May 26 in this case.

Sincerely,

W. J. B., Jr.

Justice Powell.
Copies to the Conference.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 1, 1982

RE: No. 80-945 Harlow and Butterfield v. Fitzgerald

Dear Byron and Harry:

The attached is my suggested joint statement in the above.

Sincerely,

Bill

Justice White

Justice Blackmun

Brennan 81

SUPREME COURT OF THE UNITED STATES

No. 80-945

BRYCE N. HARLOW and ALEXANDER P. BUTTERFIELD, PETITIONERS,

v. A. ERNEST FITZGERALD

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

June_____ 1982.

JUSTICES BRENNAN, WHITE AND BLACKMUN, concurring.

We join the Court's opinion but, having dissented in Nixon v. Fitzgerald, ante, we disassociate ourselves from any implication in the Court's opinion in the present case that Nixon v. Fitzgerald was correctly decided.

Brennan attach to W.B. 6/1/82

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 3, 1982.

No. 80-945 -- Harlow & Butterfield v. Fitzgerald.

Dear Lewis,

Most of the changes that you have made in your latest circulation in this case give me no difficulty. The one exception appears on page 18, near the bottom of the page, where one sentence now reads, "Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate ...." In your previous draft, this sentence began, "Where an official knows that ...." This change, to my mind, is crucial.

The change manifestly alters the substantive standard to which I agreed in my concurrence. Relying upon the sentence that you have now changed, I understood your previous draft to contain a standard "imposing liability when a public-official defendant 'knew or should have known' of the constitutionally violative effect of his actions." See Harlow v. Fitzgerald, at 1 (BRENNAN, J., concurring). My understanding is, I believe, shared by others in the Harlow majority. See Nixon v. Fitzgerald, at 19 (WHITE, J., dissenting): "Today's decision in Harlow ... makes clear that the President, were he subject to civil liability, could be held liable only for an action that he knew, or as an objective matter should have known, was illegal and a clear abuse of his authority and power." (Emphasis added.)

Moreover, this change in the substantive standard contained in Harlow is important in the resolution of future cases. As you have changed it, the standard would allow the official who actually knew he was violating the law to escape liability for his actions, so long as he could not "reasonably have been expected" to

know what he actually did know. Thus the clever and unusually well-informed violator of constitutional rights would evade just punishment for his crimes. Such a result would be very wrong, to my mind. This is particularly so given that the substantive standard announced in Harlow applies "across the board" to all public-offical defendants.

Accordingly, I suggest that you revise the sentence on page 18 to read, "Where an official knows or could be expected to know ...." Could you see your way clear to make this revision?

Sincerely,

Bill

W. J. B., Jr.

Justice Powell.
Copies to the Conference.

85

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

From: **Justice Brennan**

Circulated: JUN 3 1982

Recirculated: _____

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 80–945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS *v.* A. ERNEST FITZGERALD

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

[June ——, 1982]

JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE BLACKMUN, concurring.

We join the Court's opinion but, having dissented in *Nixon* v. *Fitzgerald*, *ante*, at ——, we disassociate ourselves from any implication in the Court's opinion in the present case that *Nixon* v. *Fitzgerald* was correctly decided.

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

From: **Justice Brennan**

Circulated: _____

Recirculated: JUN 8 1982

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 80-945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS *v.* A. ERNEST FITZGERALD

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

[June ——, 1982]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring in the opinion of the Court.

I agree with the substantive standard announced by the Court today, imposing liability when a public-official defendant "knew or should have known" of the constitutionally violative effect of his actions. *Ante*, at 15, 18. I also agree that this standard applies "across the board," to all "government officials performing discretinary functions." *Id.*, at 17. I write separately only to note that given this standard, it seems inescapable to me that some measure of discovery may sometimes be required to determine exactly what a public-official defendant did "know" at the time of his actions. In this respect the issue before us is very similar to that addressed in *Herbert* v. *Lando*, 441 U. S. 153 (1979), in which the Court observed that "To erect an impenetrable barrier to the plaintiff's use of such evdience on his side of the case is a matter of some substance, particularly when defendants themselves are prone to assert their good-faith. . . ." *Id.*, at 170. Of course, as the Court has already noted, *ante*, at 18, summary judgment will be readily available to public-official defendants whenever the state of the law was so ambiguous at the time of the alleged violation that it could not have been "known" then, and thus liability could not ensue. In my

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

From: **Justice Brennan**

Circulated: _____

Recirculated: JUN 5 1982

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 80–945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS *v.* A. ERNEST FITZGERALD

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

[June ——, 1982]

JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN, concurring.

We join the Court's opinion but, having dissented in *Nixon* v. *Fitzgerald*, *ante*, at ——, we disassociate ourselves from any implication in the Court's opinion in the present case that *Nixon* v. *Fitzgerald* was correctly decided.

Brennan 6/1

Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: _____ Jun 9 1982

3rd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 80–945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS *v.* A. ERNEST FITZGERALD

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

[June ——, 1982]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring in the opinion of the Court.

I agree with the substantive standard announced by the Court today, imposing liability when a public-official defendant "knew or should have known" of the constitutionally violative effect of his actions. *Ante*, at 15, 18. This standard would not allow the official who *actually knows* that he was violating the law to escape liability for his actions, even if he could not "reasonably have been expected" to know what he actually did know. Thus the clever and unusually well-informed violator of constitutional rights will not evade just punishment for his crimes. I also agree that this standard applies "across the board," to all "government officials performing discretionary functions." *Id.*, at 17. I write separately only to note that given this standard, it seems inescapable to me that some measure of discovery may sometimes be required to determine exactly what a public-official defendant did "know" at the time of his actions. In this respect the issue before us is very similar to that addressed in *Herbert* v. *Lando*, 441 U. S. 153 (1979), in which the Court observed that "To erect an impenetrable barrier to the plaintiff's use of such evidence on his side of the case is a matter of some substance, particularly when defendants themselves are prone to

Brennan

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 21, 1982

Re: 80-945 - Harlow and Butterfield v. Fitzgerald

Dear Lewis,

Under Procunier v. Navarette, 434 U.S. 555, and like cases, a defendant with qualified immunity is not liable for violating a statutory or constitutional right of the plaintiff unless that right was clearly established under the law in existence at the time of the alleged conduct and the defendant knew or should have known of that established right. I would not think this part of the test would be more of a legal than a factual problem: whether the law is clearly established is of that nature, and if the law is clear, it is doubtful that the defendant can absolve himself by claiming that he neither knew nor should have known the established rule applicable to his conduct.

You will also recall that in early circulations in Navarette, I unsucessfully proposed eliminating the good faith-malicious intention prong of the Scheuer-Strickland formulation of the qualified immunity test. That requirement has never made a great deal of sense to me. At the end of my memorandum last term in the Nixon case I also suggested that the rule be modified and have renewed that suggestion to you earlier this term. Hence, it will come as no surprise to you that I agree with Bill Brennan that the modification, if it is to be made, should not be confined to the President but should be a general rule.

As indicated, if the immunity turns on the state of the law, I would not think the immunity decision would be burdened with factual determinations. Nor would it be if the the law is clearly established -- there must be probable cause to arrest, for example -- and the facts are also not in dispute. The question then would be a legal one: was the officer's mistake a reasonable one, as it surely would be in cases where judges divide on whether probable cause exists. Of course, there will be recurring hassles on what the facts are and what the officer knew, but at least the qualified immunity rule, if modified as I hope you will propose, will narrow the possible factual issues a great deal.

Sincerely yours,

Byron

Justice Powell

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 27, 1982

Re: 80-945 - Harlow v. Fitzgerald

Dear Lewis,

Please add at the foot of your opinion the following notation: "Except where the Court's opinion states or implies that Nixon v. Fitzgerald, ante at _____, was well-decided, Justice White joins the opinion of the Court." Shouldn't we start again and do it all over?

Cheers,

Byron

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 1, 1982

Re: 80-945 - Harlow and
Butterfield v. Fitzgerald

Dear Bill,

Your suggested statement is all right with me.

Sincerely yours,

Byron
cpm

Justice Brennan

Copy to Justice Blackmun

cpm

Brennan

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 2, 1982

Re: No. 80-945 - Harlow and Butterfield v. Fitzgerald

Dear Bill:

Please join me in your concurring opinion.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 31, 1982

Re: No. 80-945 - Harlow v. Fitzgerald

Dear Bill:

If you will permit me to do so, I would like to have my name added to your separate concurring opinion.

Sincerely,

Harry

Justice Brennan

cc: The Conference

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

From: Justice Blackmun

Circulated: MAY 31 1982

Recirculated: _____

No. 80-945 - Harlow v. Fitzgerald

JUSTICE BLACKMUN, concurring.

Having joined the dissent in Nixon v. Fitzgerald, ante, I, like Justice White, disassociate myself from any implication in the Court's opinion in the present case that Nixon v. Fitzgerald was correctly decided. With that reservation, I join the Court's opinion.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 1, 1982

Re: No. 80-945 - Harlow and Butterfield v. Fitzgerald

Dear Bill:

The suggested joint statement is fine with me.

Sincerely,

Harry

Justice Brennan

cc: Justice White

Brennan

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 [illegible]

1st PRINTED DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 80–945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS, *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, concurring.

Having joined the dissent in *Nixon* v. *Fitzgerald*, *ante*, I, like JUSTICE WHITE, disassociate myself from any implication in the Court's opinion in the present case that *Nixon* v. *Fitzgerald* was correctly decided. With that reservation, I join the Court's opinion.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 3, 1982

MEMORANDUM TO THE CONFERENCE

Re: No. 80-945 - Harlow and Butterfield v. Fitzgerald

I, of course, am now withdrawing my separate statement of concurrence.

HAB.

.85

December 17, 1981

Harlow and Butterfield 80-945

Dear John:

In thinking further about how Harlow and Butterfield could be written, it seems to me that the options are as follows:

1. Since the implied cause of action question was at least presented and argued in the briefs (unlike the situation in Nixon) there would be this arguable reason for reaching that issue. I think we would, however, open ourselves to doctrinal criticism since both cases are here on the collateral order doctrine.

2. The alternative would be to reach the immunity issue where there is a solid majority vote for qualified immunity. I suppose the opinion could be written to emphasize that only the immunity issue was presented, that we have granted the Bush case (we have the votes to grant it) and it will enable the Court to consider the serious question whether in the government employee situation a cause of action may be implied. This should be sufficient to defer the trial of Harlow and Butterfield until after we dispose of Bush.

3. We could simply hold Harlow and Butterfield until we decide Bush, but the collateral order hurdle would still exist. For this and other reasons, I question the desirability of holding the present case. If we put up the proper "flag" this should prevent a trial of these defendants.

In sum, subject to your views, I am now persuaded we should go ahead as we discussed yesterday afternoon on absolute immunity for the President, with the reservation you may wish to state, and similarly decide Harlow/Butterfield by a holding of qualified immunity only.

The opinion could say, as my memorandum last spring said with respect to Kissinger and Mitchell, that in view of the relationship between a President and his close personal aides there is a strong presumption of good faith conduct when aides act on specific directions of a President - at least in the government employee situation.

Sincerely,

Justice Stevens

lfp/ss

March 12, 1982

80-945 Harlow

Dear John:

Here is the draft (3/8/82) of my opinion in this case that you previously reviewed. Almost all of the changes indicated are made in response to your suggestions.

Two explanations may be helpful. First, I have made no reference in the final footnote (n. 37, p. 20) to your decision in Merrill Lynch. At the same time that I am trying to make your opinion look dreadfully wrong, it would look a bit curious to include it in another opinion I am circulating. When Merrill Lynch comes down, however, I will refer to it as our latest expression on implied actions.

Now, back to Harlow. In view of your reservations about Subpart C of Part IV (p. 19), I have substantially revised the prior draft. I very much hope the substance of the revision will have your approval and become a Court opinion, or at least command sufficient support to encourage District Courts to assume greater responsibility in cases of this kind. For example, if Judge Gesell had not felt constrained by the views of CADC, I think it is evident from what he wrote in Halperin that he would have dismissed a case like this one on the basis of the plaintiff's marginal summary judgment showing.

We emphasized in Butz that District Courts should be able to identify early the insubstantial suits, and prevent them from dragging on for years - as is now taking place. The assumption that District Courts would be sensitive to their duty to do this underlies the distinction we have drawn between qualified and absolute immunity.

Again, I express my appreciation for your willingness to help me put the draft in a form that both of us can support before I circulate. I will await further word from you.

Sincerely,

Justice Stevens

lfp/ss

5, 10, 13, 14, 15, 18, 18a, 19, 19a, 19b, 20

(amendt K) JPS 3/12/82

2nd CHAMBERS DRAFT
3/8/82

# SUPREME COURT OF THE UNITED STATES

No. 80-945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS *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 issue in this case is the scope of the immunity available to the senior aides and advisers of the President of the United States in a suit for damages based upon their official acts.

## I

In this suit for civil damages petitioners Bryce Harlow and Alexander Butterfield are alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the respondent A. Ernest Fitzgerald. Respondent avers that petitioners entered the conspiracy in their capacities as senior White House aides to former President Richard M. Nixon. As the alleged conspiracy is the same as that involved in *Nixon* v. *Fitzgerald*, *ante*, the facts need not be repeated in detail.

Respondent claims that Harlow joined the conspiracy in his role as the Presidential aide principally responsible for congressional relations.[1] At the conclusion of discovery the

[1] Harlow held this position from the beginning of the Nixon Administration on January 20, 1969 through November 4, 1969. On that date he was designated as Counsellor to the President, a position accorded Cabinet status. He served in that capacity until December 9, 1970, when he returned to private life. Harlow later resumed the duties of Counsellor for the pe-

80-945

March 15, 1982

PERSONAL

Dear John:

Again I thank you for reviewing my Harlow draft, and the suggested revisions.

I consider your support essential. Sandra favors qualified immunity. But, unless the opinion persuades the Chief and Bill Rehnquist, they will go for absolute immunity. Whether Byron will be content with the way I have written Harlow remains to be seen. If he joins us, we will still need one of our Brothers who were with Byron last Term.

In this uncertain posture of the case, I would like to have Harlow satisfactory to you so that you could join promptly after circulation. I therefore am eliminating Subpart C. I would like, however, to keep a gentle admonition in the opinion somewhere, and suggest the enclosed footnote to be added as a paragraph on page 16 at the place indicated. The note is faithful to the Court's opinion in Butz.

I add, in response to your letter, that I do think Subpart C is well within the authority of the Court. Qualified immunity is a judge-made doctrine, and I would think we properly may define safeguards to its application. Because of the strong public interest in a case of this kind, it differs from the relevant considerations on summary judgment in the typical civil litigation. I make this point only in response to your view - but in recognition that you could be right.

Sincerely,

Justice Stevens

lfp/ss

March 17, 1982

PERSONAL

80-945 Harlow

Dear Chief and Bill:

I am circulating this afternoon draft opinions in Nixon and Harlow.

Nixon is written, I believe, in full accord with your respective views. In writing Harlow, I have followed - as I feel obligated to do - the Court's decision in Butz v. Economou, a decision that I know displeases both of you. You will recall that last Term, in each of the eight separate drafts of my memorandum in the Kissinger case, I also applied the Butz qualified immunity rationale with respect to the claims against Kissinger, Mitchell and Halderman. I did recognize, however, that even where an official normally has qualified immunity only, certain functions are sufficiently sensitive to justify absolute protection, e.g., national defense.

I invite your attention today particularly to one major change that I have incorporated in the Harlow opinion. I propose a modification of the Wood v. Strickland standard to eliminate the "malice" component. Byron suggested this last Term, and I am happy to accede to the suggestion. My guess is that most of the protracted trials have resulted - as in this case - from allegations of subjective malice which generally create jury questions. In sum, if there is a Court for Harlow the way it is written, I think District Courts will be encouraged to identify and dismiss insubstantial claims.

I add that the apparent alternative to a Court along the lines of my draft is a fractured Court, perhaps splitting three ways that may leave the malice component in the standard, and the CADC opinion in Kissinger as the law at least of this Circuit.

Sincerely,

The Chief Justice
Justice Rehnquist

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: _____

1st PRINTED DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 80-945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS *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 issue in this case is the scope of the immunity available to the senior aides and advisers of the President of the United States in a suit for damages based upon their official acts.

I

In this suit for civil damages petitioners Bryce Harlow and Alexander Butterfield are alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the respondent A. Ernest Fitzgerald. Respondent avers that petitioners entered the conspiracy in their capacities as senior White House aides to former President Richard M. Nixon. As the alleged conspiracy is the same as that involved in *Nixon* v. *Fitzgerald*, *ante*, the facts need not be repeated in detail.

Respondent claims that Harlow joined the conspiracy in his role as the Presidential aide principally responsible for congressional relations.[1] At the conclusion of discovery the

[1] Harlow held this position from the beginning of the Nixon Administration on January 20, 1969 through November 4, 1969. On that date he was designated as Counsellor to the President, a position accorded Cabinet status. He served in that capacity until December 9, 1970, when he returned to private life. Harlow later resumed the duties of Counsellor for the pe-

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 18, 1982

80-945 Harlow and Butterfield v. Fitzgerald

Dear John:

Thank you for your "join" in the above case.

This will confirm that I will add appropriate language in footnote 35 to reflect a Court opinion in Merrill Lynch. As I am dissenting in that case, and even though my cause may be "lost", I will await the final decision before making the change.

Sincerely,

L. Lewis

Justice Stevens

lfp/ss

cc: The Conference

pgs 18, 19

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

From: **Justice Powell**

Circulated: _____

Recirculated: APR 6 1982

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 80-945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS, *v.* A. ERNEST FITZGERALD

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

[April ——, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is the scope of the immunity available to the senior aides and advisers of the President of the United States in a suit for damages based upon their official acts.

## I

In this suit for civil damages petitioners Bryce Harlow and Alexander Butterfield are alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the respondent A. Ernest Fitzgerald. Respondent avers that petitioners entered the conspiracy in their capacities as senior White House aides to former President Richard M. Nixon. As the alleged conspiracy is the same as that involved in *Nixon* v. *Fitzgerald*, *ante*, the facts need not be repeated in detail.

Respondent claims that Harlow joined the conspiracy in his role as the Presidential aide principally responsible for congressional relations.[1] At the conclusion of discovery the

[1] Harlow held this position from the beginning of the Nixon Administration on January 20, 1969 through November 4, 1969. On that date he was designated as Counsellor to the President, a position accorded Cabinet status. He served in that capacity until December 9, 1970, when he returned to private life. Harlow later resumed the duties of Counsellor for the pe-

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 22, 1982

80-945 Harlow and Butterfield v. Fitzgerald

Dear Byron:

Thank you for your helpful letter of May 21.

As you know from our several conversations, I am in entire agreement as to the desirability of eliminating the good faith-malicious intention component of the Scheuer-Strickland formulation of the qualified immunity test. In the draft I circulated on April 6 in this case, I limited the opinion to senior aides of the President only because the petitioners in this case were in that category.

Since our conversations, I have been in touch with the Justices who joined my draft, and they also are agreeable to the view that our opinion should not be so limited.

I am presently making revisions to accomplish this change, and hope to be recirculating early next week.

I also agree with your identification, in the last paragraph of your letter, of the issues that normally would be decided by a court rather than a jury.

Sincerely,

Lewis

Justice White

lfp/ss

cc: The Conference

May 26, 1982

80-945 Harlow v. Fitzgerald

Dear Sandra:

Although the last sentence on page 18 was not intended to reintroduce a subjective test, there may be - as you suggest - some ambiguity.

Accordingly, in my next circulation I will make the changes indicated on the enclosed copy of page 18.

I commend your care in weighing every word, a degree of care that we rarely find here during the last few weeks.

Sincerely,

Justice O'Connor

lfp/ss

Dick: I would not recirculate until we give other Chambers a chance to comment on our changes - comments I hope will not be made.

sion to the contrary, we conclude that public policy will not support the cost of conditioning their immunity on proof of subjective intent.

Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law,[31] should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine what the law was at the time the action occurred and in most cases what a reasonable person could have been expected to know about it.[32] Until this threshold immunity question is resolved, extensive discovery generally should not be allowed.

By defining the limits of qualified immunity solely in "objective" terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official knows that his conduct will violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such knowing conduct may have a cause of action.[33] But where an official's

---

tion against federal officials." *Butz* v. *Economou*, 438 U. S., at 504.

Our decision in no way diminishes the absolute immunity currently available to officials whose functions have been held to require a protection of this scope.

[31] This case involves no claim that Congress has expressed its intent to impose "no fault" tort liability on high federal officials for violations of particular statutes or the Constitution.

[32] As in *Procunier* v. *Navarette*, 434 U. S. 555, 565 (1978), we need not define here the circumstances under which "the state of the law" should be "evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court."

[33] Cf. *Procunier* v. *Navarette*, *supra*, 434 U. S., at 565 (footnote omitted) ("Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for established law that their conduct 'cannot reason-

stylistic changes throughout
Footnotes renumbered
9-10, 16-19

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 26 1982

3rd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 80-945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS, *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 issue in this case is the scope of the immunity available to the senior aides and advisers of the President of the United States in a suit for damages based upon their official acts.

## I

In this suit for civil damages petitioners Bryce Harlow and Alexander Butterfield are alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the respondent A. Ernest Fitzgerald. Respondent avers that petitioners entered the conspiracy in their capacities as senior White House aides to former President Richard M. Nixon. As the alleged conspiracy is the same as that involved in *Nixon* v. *Fitzgerald, ante*, the facts need not be repeated in detail.

Respondent claims that Harlow joined the conspiracy in his role as the Presidential aide principally responsible for congressional relations.[1] At the conclusion of discovery the

[1] Harlow held this position from the beginning of the Nixon Administration on January 20, 1969 through November 4, 1969. On that date he was designated as Counsellor to the President, a position accorded Cabinet status. He served in that capacity until December 9, 1970, when he returned to private life. Harlow later resumed the duties of Counsellor for the pe-

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 26, 1982

80-945 Harlow v. Fitzgerald

Dear Bill:

Again I am a bit tardy in responding to your letter of May 19.

In working on the draft I am circulating this morning, I have had your suggestions in mind. The opinion is now in accord with your view and Byron's that the good faith immunity standard should extend "across the board." I also removed the term "settled, indisputable rights." Although that formulation did appear in Wood v. Strickland, the current draft defines the substantive standard in terms of "clearly established" statutory and constitutional rights. See pages 17-19. This change is in accord with the more recent language in Navarette.

I hesitate to add language that may weaken our renewed admonition against abuse of discovery in these suits against officials. We know from experience that, despite what we said in Butz, District Courts have tended in these cases to allow litigation to go on for years through discovery.

Sincerely,

Lewis

Justice Brennan

lfp/ss

cc: The Conference

Changes at 7, 10-15, 18

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. 80-945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS *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 issue in this case is the scope of the immunity available to the senior aides and advisers of the President of the United States in a suit for damages based upon their official acts.

I

In this suit for civil damages petitioners Bryce Harlow and Alexander Butterfield are alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the respondent A. Ernest Fitzgerald. Respondent avers that petitioners entered the conspiracy in their capacities as senior White House aides to former President Richard M. Nixon. As the alleged conspiracy is the same as that involved in *Nixon* v. *Fitzgerald*, *ante*, the facts need not be repeated in detail.

Respondent claims that Harlow joined the conspiracy in his role as the Presidential aide principally responsible for congressional relations.[1] At the conclusion of discovery the

[1] Harlow held this position from the beginning of the Nixon Administration on January 20, 1969 through November 4, 1969. On that date he was designated as Counsellor to the President, a position accorded Cabinet status. He served in that capacity until December 9, 1970, when he returned to private life. Harlow later resumed the duties of Counsellor for the pe-

June 7, 1982

80-945 Harlow

Dear Byron:

Over the weekend I took a closer look at your suggested substitute for the last two sentences of the first full paragraph on p. 18.

Its substance is agreeable to me. I believe it would be somewhat clearer, however, if the first two sentences were revised as I have indicated on my draft of this morning.

I also ommitted the word "extensive" prior to discovery in your third sentence. I have made no further changes.

I agree that it would be a good idea to talk to Bill Brennan, and will join you whenever this is convenient for you and him - preferably some time prior to lunch.

I am grateful to you for your help. At this season of the year, one's own problems more than suffice to overwhelm. At least mine do!

Sincerely,

Justice White

lfp/ss

— P. 17, 18

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 8 1982

5th DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 80-945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS *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 issue in this case is the scope of the immunity available to the senior aides and advisers of the President of the United States in a suit for damages based upon their official acts.

I

In this suit for civil damages petitioners Bryce Harlow and Alexander Butterfield are alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the respondent A. Ernest Fitzgerald. Respondent avers that petitioners entered the conspiracy in their capacities as senior White House aides to former President Richard M. Nixon. As the alleged conspiracy is the same as that involved in *Nixon* v. *Fitzgerald*, *ante*, the facts need not be repeated in detail.

Respondent claims that Harlow joined the conspiracy in his role as the Presidential aide principally responsible for congressional relations.[1] At the conclusion of discovery the

[1] Harlow held this position from the beginning of the Nixon Administration on January 20, 1969 through November 4, 1969. On that date he was designated as Counsellor to the President, a position accorded Cabinet status. He served in that capacity until December 9, 1970, when he returned to private life. Harlow later resumed the duties of Counsellor for the pe-

13 and stylistic

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 19 1982

6th DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 80–945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS *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 issue in this case is the scope of the immunity available to the senior aides and advisers of the President of the United States in a suit for damages based upon their official acts.

I

In this suit for civil damages petitioners Bryce Harlow and Alexander Butterfield are alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the respondent A. Ernest Fitzgerald. Respondent avers that petitioners entered the conspiracy in their capacities as senior White House aides to former President Richard M. Nixon. As the alleged conspiracy is the same as that involved in *Nixon* v. *Fitzgerald*, *ante*, the facts need not be repeated in detail.

Respondent claims that Harlow joined the conspiracy in his role as the Presidential aide principally responsible for congressional relations.[1] At the conclusion of discovery the

[1] Harlow held this position from the beginning of the Nixon Administration on January 20, 1969 through November 4, 1969. On that date he was designated as Counsellor to the President, a position accorded Cabinet status. He served in that capacity until December 9, 1970, when he returned to private life. Harlow later resumed the duties of Counsellor for the pe-

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 1, 1982

Re: No. 80-945 Harlow & Butterfield v. Fitzgerald

Dear Lewis:

I basically agree with the approach you have taken in this case. I too think that the inquiry of courts in suits against high executive officials should, in those cases where absolute immunity cannot be established, be limited to "objective" good faith. You correctly state that "there often is no clear end to the evidence that may be probative of subjective intent," and that "[j]udicial inquiry into subjective motivation therefore may entail broad-ranging discovery and deposition of numerous individuals." Draft Opinion at 16.

As I understand your opinion, cases will proceed past the summary judgment stage only if the trial court determines (1) that the allegedly violated constitutional rights were well established at the time of the official's action, and (2) that the particular defendant reasonably could be expected to have known about the existence of those rights. I think this approach will facilitate resolution of cases at the summary judgment stage; but I think such resolution would be even easier if the second part of your test required courts to determine whether a "reasonable person" -- as opposed to this particular defendant -- would have known of the existence of the asserted constitutional rights. Perhaps there is not much difference between what a "reasonable person" should have known and what this defendant "reasonably should have known." But by placing the focus on this defendant, I fear that courts will permit "broad-ranging discovery and deposition[s]" in an effort to determine what past exposure this defendant has had to constitutional law. With such a focus, courts may also be slow to grant summary judgment if there is some question as to the extent of the defendant's familiarity with legal matters.

I think that such a possibility could be foreclosed by two minor changes in your opinion. First, the third full sentence on page 18 could be changed to read: "Consistently with the balance at which we aimed in Butz, we therefore hold that at least high executive officials are shielded from liability for civil damages insofar as their conduct does not violate 'settled, indisputable' legal rights of which a reasonable person would have known." Second, the third full sentence on page 19 could be amended to read: "On summary judgment, the judge appropriately may determine what the law was at the time the action occurred and what a reasonable person could have been expected to know about it."

Sincerely,

Justice Powell

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 5, 1982

Re: No. 80-945 Harlow v. Fitzgerald

Dear Lewis:

Please join me in your proposed opinion. I anticipate writing a separate concurrence consisting of about one paragraph.

Sincerely,

WHR

Justice Powell

cc: The Conference

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

From: **Justice Rehnquist**

Circulated: APR 6 1982

Recirculated: _____

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 80-945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS, *v.* A. ERNEST FITZGERALD

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

[April ——, 1982]

JUSTICE REHNQUIST, concurring

At such time as a majority of the Court is willing to re-examine our holding in *Butz* v. *Economou*, 438 U.S. 478 (1978), I shall join in that undertaking with alacrity. But until that time comes, I agree that the Court's opinion in this case properly disposes of the issues presented, and I therefore join it.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 26, 1982

Re: No. 80-945 Harlow v. Fitzgerald

Dear Lewis:

I think it is very important to maintain the language about abuse of discovery to which you refer in the third paragraph of your letter to Bill Brennan dated May 26th. After all, you have a Court for that language, and I would see no advantage in weakening it in order to get a couple more votes for the opinion.

Sincerely,

WHR

Justice Powell

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 10, 1982

Re: 80-945 - Harlow & Butterfield v. Fitzgerald

Dear Lewis:

Perhaps the footnote that I suggested could be added on to the end of footnote 24 on pages 14-15 and might read something like this:

> "The two-pronged standard as phrased in Wood is, of course, somewhat redundant. For if it is determined that the defendant neither knew nor should have known that his conduct would violate the plaintiff's constitutional rights, it would necessarily follow that the defendant could not have acted with malicious intention to cause a deprivation of a constitutional right that defendant knew nothing about."

Respectfully,

JPS

Justice Powell

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 15, 1982

Re: 80-945 - Harlow & Butterfield v. Fitzgerald

Dear Lewis:

Thank you for sending me a copy of your revised draft of the opinion. I think it is a fine job; it satisfies my concerns in all except the two respects you mentioned in your letter.

You are, of course, entirely correct in postponing any reference to Merrill Lynch until that case comes down.

Your rewrite of Subpart C of Part IV is a substantial improvement and certainly makes good sense but I am still troubled by our lack of power to amend the Federal Rules of Civil Procedure for one class of litigants. The problem is the same basic issue that separated us in cases like Duke Power, New York Telephone, Snepp, and most recently, Mite. In all of those cases, your vote was consistent with wise policy and mine may have reflected nothing but an out-of-date notion about the scope of our power. Nevertheless, I do not believe I will be able to join IV-C. I suggest that you circulate it in its present form anyway. It may well command a Court. I will not respond to it immediately, and ultimately may simply write a sentence or two noting my inability to join that portion of your opinion.

Respectfully,

Justice Powell

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 18, 1982

Re: 80-945 - Harlow and Butterfield
v. Fitzgerald

Dear Lewis:

If my presently circulating opinion in Merrill Lynch becomes a Court opinion, I will ask you to make a modest language change in footnote 35. On the assumption that we will have no difficulty agreeing on an appropriate change in that footnote, please join me in your opinion.

Respectfully,

JPS

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 1, 1982

No. 80-945 Harlow v. Fitzgerald

Dear Lewis,

You have accomplished a difficult task in drafting opinions in this and the Nixon case. They are both well thought out and I am in general agreement with your treatment of this case. I am prepared to support the adoption of an "objective" good faith standard for qualified immunity.

I would not go so far, however, as to immunize illegal actions undertaken in ignorance of "basic, unquestioned" or "settled, indisputable" constitutional rights. "High executive officials" should be charged with knowledge of such rights and should be encouraged to seek the advice of the counsel available to senior officers whenever doubts arise. An ordinary citizen running even a small business must conform to myriad statutes and regulations and acts at his own peril when he acts in ignorance, whether the law is settled or not. We should, I think, expect no less from our officials, at least as regards well-established rights. Moreover, demanding something less invites much litigation over how much law a given official should have been aware of.

For these reasons, I am troubled by the following language on page 19 of your draft: "Charged with decisionmaking under pressures of time and limits of information, not every official fairly could be held responsible for areas of the law remote from his experience or duties. Nor is it reasonable to expect every such official to be familiar with the most recent judicial developments." Would you consider eliminating these sentences from the draft?

Sincerely,

Sandra

Justice Powell

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 5, 1982

No. 80-945 Harlow and Butterfield v.
v. Fitzgerald

Dear Lewis,

Your changes are excellent and I am well satisfied with the draft as revised.

Sincerely,

Sandra

Justice Powell

cc: Justice Rehnquist

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 5, 1982

No. 80-945 Harlow v. Fitzgerald

Dear Lewis,

Please join me in your proposed opinion.

Sincerely,

Sandra

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 26, 1982

No. 80-945 Harlow and Butterfield v. Fitzgerald

Dear Lewis,

As you know, I have previously joined this opinion and I am still with you. I write this only to seek clarification of the last full sentence on page 18. It states that knowledge by an official that his conduct will violate statutory or constitutional rights is sufficient for liability. However, on the preceding pages, and at page 17, I understood the draft to indicate that the subjective element is being discarded and that liability will be imposed only when the official conduct violates clearly established rights of which a reasonable person would have known. Does the sentence on page 18 reintroduce a subjective test?

Sincerely,

Sandra

Justice Powell

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 27, 1982

No. 80-945 Harlow and Butterfield v. Fitzgerald

Dear Lewis,

I continue to join you in this opinion.

Sincerely,

Sandra

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 7, 1982

No. 80-945 Harlow and Butterfield v. Fitzgerald

Dear Lewis,

I have no objection to the proposed change in Nixon. It is still primarily an objective test.

Sincerely,

Sandra

Justice Powell