Dear Chief:

Thank you for your letter of December 14, that reached me late yesterday. I respect, of course, your view that absolute immunity is the threshold question. As you say, if there is absolute immunity a suit is aborted at the outset. It can be said with equal, if not greater, logic that if there is no cause of action one never reaches the immunity question.

I gave a copy of this draft to John Stevens, and after a full discussion he agreed - subject to one reservation - to join.

79-1738 Nixon v. Fitzgerald and 80-945 Harlow v. Fitzgerald
A somewhat stronger reason for going the "immunity" route is that these cases are here on the collateral order doctrine. This is the concern of Bill Rehnquist and Sandra. Yet, for reasons stated by Byron, John and me, we have jurisdiction to reach the cause of action question ("Bivens") and this continues to be my preferred resolution of these cases.

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There could be seven votes for a Bivens resolution of both of these cases. You, WHR and SO'C, though preferring immunity, also agree with JPS and me on Bivens. Byron, however, will write his Bivens analysis narrowly, based primarily on the fact that this case involves the relationship of employer - employee in the government service. Thurgood said he would join Byron on this analysis. I would write Bivens broadly, as I did last spring, but would leave open whether a president could be sued for damages if the congress specifically authorized suit. You have agreed in our discussions that the likelihood of such a statute being adopted over a presidential veto is remote.
In sum, we would have seven votes for a Bivens disposition, although two of the votes would be for the judgment only. Nevertheless, there are distinct advantages in having a solid Court for the judgment in the Nixon case.

Again at the prudential level, we must look also to the effect of the way Nixon is written on Harlow. That case presents precisely the same options: a holding of no implied cause of action (Bivens) or a resolution on the immunity issue.

If we were to reach the immunity issue in Nixon on the ground that Bivens is not here, we would be compelled to do likewise in Harlow. The result would be - if the votes remain as stated at Monday's Conference - seven for qualified immunity only, resulting in affirmance. You and WHR alone would find absolute immunity. I feel bound generally by Scheuer and Butz, and this was the position I
took last Term with respect to Halderman in the Kissinger case. If, however, we decided Harlow on Bivens analysis there would be seven votes for reversal.

Thus, if we all were to remain with our "first choice" votes the division in Nixon would be as follows: Three votes for absolute immunity (CJ, WHR and SOC); two votes for a broad Bivens disposition (LFP, JPS); two votes for a narrow Bivens disposition (BRW, TM); and WJB and HAB to DIG. There would be no Court opinion, but seven votes for reversal. If, however, John and I were to defer to your views, there would be a Court of five votes for reversal on absolute immunity. Byron has said he then would not reach the Bivens issue and he and Thurgood would dissent on immunity. This would leave only five votes for the judgment of reversal.

Neither of these "line-ups" is attractive. A good deal can be said, particularly in a case involving Nixon's
personal liability, for seven votes on the judgment
(Bivens). But we would then have a badly fractionated Court
- a result that none of us would welcome. Indeed, we have -
in this case particularly - a strong institutional reason
for avoiding fractionalization. I therefore am inclined
reluctantly, and subject to talking to John, to defer to
your view. On balance, I think it may be preferable in
Nixon to have a Court opinion than to end up with seven
votes for a judgment with no more than three votes for any
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Sincerely,

The Chief Justice

cc - Justice Stevens
December 16, 1981

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

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If we were to reach the immunity issue in Nixon on the ground that Bivens is not here, we would be compelled to do likewise in Harlow. The result would be - if the votes remain as stated at Monday's Conference - seven for qualified immunity only. You and WHR alone would find absolute immunity. I feel bound generally by Scherer and Butz, and more particularly by our affirmation last Term of
qualified immunity for Halderman in the Kissinger case. If, however, we decided Harlow on Bivens analysis there would be seven votes for reversal.

Thus, if we all were to remain with our "first choice" votes the division in Nixon would be as follows:

Three votes for absolute immunity (CJ, WHR and SOC); two votes for a broad Bivens disposition (LFP, JPS); two votes for a narrow Bivens disposition (BRW, TM); and WJB and HAB to DIGF. There would be no Court opinion, but seven votes for reversal. If, however, John and I were to defer to your views, there would be a Court of five votes for reversal on absolute immunity. Byron has said he then would not reach the Bivens issue and he and Thurgood would dissent on immunity. This would leave only five votes for the judgment of reversal.

Neither of these "line-ups" is attractive. A good deal can be said, particularly in a case involving Nixon's
personal liability, for seven votes on the judgment (Bivens). But we will have a badly fractionated Court - a result that none of us would welcome. Indeed, we have - in this case particularly - a strong institutional reason for avoiding fractionalization. I therefore am inclined reluctantly, and subject to talking to John, to defer to you.

On balance, I think it may be best to have a Court opinion than seven votes for a judgment with no more than three votes for any single rationale.

Sincerely,

The Chief Justice

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December 16, 1981

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

Dear Chief:

Thank you for your letter of December 14, that reached me late yesterday. I respect, of course, your view that absolute immunity is the threshold question. As you say, if there is absolute immunity a suit is aborted at the outset. It can be said with equal logic as I view it, that if there is no cause of action one need not consider the immunity question.
A somewhat stronger reason for going the "immunity" route is that these cases are here on the collateral order doctrine, with cert granted on the immunity issue. This is the concern of Bill Rehnquist and Sandra. Yet, for reasons stated by Byron, John and me, we have jurisdiction to reach the cause of action question ("Bivens") and for the reasons I will now summarize, I continue to prefer this resolution of these cases.

I stated at the outset, however, that the importance of the cases - and the involvement of a highly controversial president - make it imperative that we make every effort to have a Court opinion, as well as as many votes for the judgment as can be mustered. The following "chart" shows the votes at Monday's Conference:

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likelihood of such a statute being adopted over a presidential veto is remote.

In sum, we would have seven votes for a Bivens disposition, although two of the votes would be for the judgment only. Nevertheless, there are distinct advantages in having a solid Court for the judgment in the Nixon case.

Again at the prudential level, we must look also to the effect of the way Nixon is written on Harlow and the case presents precisely the same options: a holding of no implied cause of action (Bivens) or a resolution of the immunity issue.

If we were to reach the immunity issue in Nixon on the ground that Bivens is not here, we would be compelled to do likewise in Harlow. The result would be – if the votes
remain as stated at Monday's Conference - seven for qualified immunity only. You and WHR alone would find absolute immunity. I feel bound generally by Scherer and Butz, and more particularly by our affirmance last Term of qualified immunity for Halderman in the Kissinger case.

If, however, we decided Harlow on Bivens analysis again there would be a strong majority vote for reversal. When I use the term "prudential" in this connection, I am thinking only of the desirability of mustering strong majorities in two cases that are certain to attract enormous public interest and scrutiny. Believing, as I do, that there is no cause of action against any one of these three petitioners, I also would like to end the litigation as to all three of them. If we go the immunity route, Harlow and Butterfield will have to undergo a trial on remand.
In sum, if we all were to remain with our "first choice" votes the division in these cases - depending on which theory the five of us in the majority adopt - would as follows:

Three votes for absolute immunity (CJ, WHR and SOC);
double votes for a broad Bivens disposition (LFP, JPS);
double votes for a narrow Bivens disposition (BRW, TM); and WJB and HAB to DIGG. There would be no Court opinion, but seven votes for reversal.

An alternative that I will discuss with John is that we defer to your views and make a Court of five votes for reversal on absolute immunity. My understanding is that if we should do this, Byron also would not reach the Bivens issue and he and Thurgood would dissent on immunity.
Neither of these "line-ups" is ideal. A good deal can be said, particularly in a case involving Nixon's personal liability, for seven votes on the judgment (Bivens). But unless you, WHR, JPS, BOC and I get together on one of these approaches, we will have a badly fractionated Court — a result that none of us would welcome. Indeed, we have — in this case particularly — a strong institutional reason for avoiding fractionalization. I therefore am inclined reluctantly, as and subject to talking to John, to defer to you. On balance, I think it may be best to have a count opinion than seven votes for a judgment with no more than three votes for any single rationale.

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LFP/vde

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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 (referred to, for brevity, as the Bivens question). You 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 not 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 context of the special relationship of government employment. John and I preferred to address the cause of action question broadly,
holding as my Version II memorandum of last spring was written, on the ground that at least in the absence of specific congressional authorization no cause of action could be implied against the President of the United States.

Thus, it is evident that there may be no Court opinion 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 at some length in my Version I memorandum last spring. John and you both joined that memorandum. I have discussed the situation with John, and subject to a possible qualification as to a reservation that would not prevent a Court opinion, John also is willing to decide the Nixon case on absolute immunity.

I am not entirely at rest as to how to write the Harlow/Butterfield case. The private cause of action issue, though not a question specifically presented in the
petition, was stated as a question in their brief and was argued. Moreover, if we reach the immunity issue in the Harlow/Butterfield case, the decision would be for qualified immunity only. As there is a Court to dispose of this case finally on the absence of an implied cause of action, it would be unfortunate to remand it for trial on implied immunity. 

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Nixon
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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. Subject to a possible reservation that would not prevent a Court opinion, John therefore is willing to decide the Nixon case on absolute immunity.

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The Chief Justice
December 17, 1981

78-1738 Nixon v. Fitzgerald

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.

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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
December 17, 1981

78-1738 Nixon v. Fitzgerald

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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.

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