Jan. 29, 1982

TO:  MR. JUSTICE POWELL
FROM:  DICK FALLON
RE:  Attached Nixon Drafts

Attached is my first attempt at a draft in Nixon. The first two sections (about the first 16 pages) deal with the facts of this case and its jurisdictional issues.

The subsequent sections are entirely new, though of course very similar in some respects to last year's Draft VI, Version I. It is only fair to say, however, that there are major changes of emphasis. In doing the research, I became increasingly persuaded of two points. First, the separation of powers is a very flexible doctrine. It is therefore difficult to rest an absolute constitutional prohibition of presidential liability on this doctrine. Second, the Court repeatedly has recognized that the law of immunity is appropriately of judicial making. From this perspective, I think there are much more powerful arguments that the judiciary should not impose liability on the President, at least in the absence of an express command from Congress. At this level I think the separation of powers argument to be much less subject to attacks that it has claimed too much—i.e.,
arguments that an excessively rigid doctrine is inconsistent with such cases as United States v. Nixon and even Youngstown Sheet & Tube Co. v. Sawyer. Thus, at bottom, the draft opinion would hold that the President was absolutely immune from suits for damages at least in the absence of clear congressional action imposing liability; and it reserves—rather than deciding—the question what would happen in that unlikely case of a direct constitutional conflict between the claims of the Executive and Legislative branches. Again, it makes clear that the judiciary must recognize the President as absolutely immune both from Bivens actions and from suits under statutes of merely general applicability.

Beginning with Section III, however, I should say that I think it would be possible simply to readopt the pertinent sections from last year’s draft VI, Version I. I therefore have attached these sections as a second draft for your consideration. The first two sections (dealing with the facts and jurisdiction) are omitted from this draft, which begins with Section III.

I have not yet begun—or really begun to think very seriously about—a Harlow draft. It has occurred to me, however, that changes in Nixon may seem desirable or even necessary to dispose of questions that may arise in Harlow. But I do not think that this should be a problem, as I expect to have at least a rough draft in Harlow well before Nixon is ready to circulate out-of-chambers.
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
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,

Justice Powell
March 5, 1982

TO: MR. JUSTICE POWELL
FROM: DICK FALLON
RE: Nixon, Harlow, and Butterfield

Attached are three drafts, two of which are appended mostly for reference. (1) A Nixon draft, marked up to incorporate (a) your last requested changes; (b) the changes suggested by Justice Stevens; (c) editing changes to make it compatible with the tenor of Harlow; and (d) sundry but essentially insubstantial changes resulting from research in the record done mostly for Harlow.

(2) A printed Harlow draft, also hand-edited, incorporating the changes you requested and a few alterations and additions of mine.

(3) An alternative draft on Harlow Section IV, following the line of analysis that you discussed with Justice White.

There remains for you the major choice which approach to take. When you make it, however, nearly everything should be ready for the printer. As you will notice, clean printed copies would be required before you would want to show anything even
informally to another Justice. I would think, however, that anything and everything could be ready not later than Tuesday.
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
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
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
March 18, 1982

Re: 79-1738 - Nixon v. Fitzgerald

Dear Lewis:

Please join me.

Respectfully,

Justice Powell

Copies to the Conference
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's 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
March 22, 1982

Re: 79-1728 - 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
March 29, 1982

No. 79-1738  Nixon v. Fitzgerald

Dear Lewis,

Please join me.

Sincerely,

[Signature]

Justice Powell

Copies to the Conference
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
79-1738—MEMORANDUM OF CONCURRENCE

2 NIXON v. FITZGERALD

(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). It has not been used, however, to control or intimidate other branches. The proposed opinion correctly observes that judicial intrusion through private damage actions improperly impinges on and hence interferes with the essential independence of a President.1

Exposing a President to civil damage actions for official acts within the scope of the Executive authority unduly subjects presidential actions to judicial scrutiny. The judiciary always must be hesitant to probe into the elements of presidential decision-making and such judicial intervention is not to be tolerated absent imperative constitutional necessity. We found such intervention warranted in order to assure the proper administration of justice. United States v. Nixon, 418 U. S., at 709-716.2 No such intervention is warranted in the present case.

The enormous range and impact of presidential decisions-inescapably beyond that of any one Member of Congress—inevitably means that large numbers of persons will consider themselves aggrieved by such acts. Absent absolute immunity, every person who feels aggrieved may bring a suit for damages, and each suit—especially those that proceed on the merits—will involve at least a minimum of judicial questioning of presidential acts, including the reasons for the action and the information on which it was based. This kind of scrutiny of day-to-day decisions of the Executive Branch would inevitably occur if private civil damage actions are

1The separation of powers doctrine is implicated to the extent that the courts entertain private damage actions for presidential acts taken in the "outer perimeter" of the President's official responsibility. Ante, at 18-20, n. 35. We do not consider here suits involving acts outside the "outer perimeter" of official authority.

2This concept emerged in the early years of our national existence as well. United States v. Burr, 4 Cranch 469, 507 (1807).
brought to advance the private interests of the individual citizen. Although the individual who claims wrongful conduct may indeed have sustained some injury, the need to prevent inevitable large-scale invasion of the Executive function by the judiciary far outweighs the need to vindicate the private claims. We have decided that in precisely this same sense, the need of a Member of both Houses of Congress and their aides to be free from such judicial scrutiny outweighs the need for private redress of one claiming injury from acts of a Member or aide of a Member.

Judicial intervention would also inevitably inhibit the processes of Executive Branch decision-making and impede the functioning of the Office of the President. Imposition of liability for damage actions would have a serious effect of diverting the attention of a President from his executive duties since defending a lawsuit today—even a lawsuit ultimately found to be frivolous—often requires significant expenditures of time and money. There is a significant likelihood that a President, whose unfettered discretion is absolutely essential to the functioning of the Executive Branch, would have to weigh the possibility of litigation in making or authorizing decisions. Many problems arise in which the choice of the Executive may be a “close call” on a particular decision or course of action; fear of a lawsuit could well inhibit appropriate action. Ultimate vindication on the merits after trial is plainly

---

3 The Federal Tort Claims Act of 1946 reflects this policy distinction; in it Congress waived sovereign immunity for certain damage claims, but pointedly excepted any “discretionary function or duty . . . whether or not the discretion involved be abused.” 28 U. S. C. § 2680(a) (1976). For such injuries Congress may in its discretion provide separate non-judicial remedies such as private bills.

In this case Fitzgerald received substantial relief through the route provided by Congress: the Civil Service Commission ordered him reinstated with backpay. Joint App. 87a—88a. In addition, he has to date received $142,000 in partial settlement of the suit. Nixon v. Fitzgerald, ante, at 11. Respondent can hardly argue that he has been denied relief.
a paper shield for a President.

In short, the constitutional concept of separation of co-equal powers dictates that a President be immune from civil damage actions based on acts within the broad scope of Executive authority. Even when a President, acting in his official capacity, takes actions later held to be unconstitutional, an aggrieved citizen's recovery must be by way of Congressional acts designed to limit intrusion of the judiciary into presidential affairs.

1 Human fallibility being a reality, Congress in the Federal Tort Claims Act took pains to recognize that even when governmental action is in error, sovereign immunity is preserved for discretionary acts. See 28 U. S. C. § 2680(a) (1976).
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,

Justice Powell

cc: The Conference
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,

Justic Powell

cc: The Conference
HARLAN'S concern is in Bivens:

"The range of policy considerations... into a/c us at least as broad as the range of those in which a legislature would conclude it is appropriate to authorize a remedy" - 13 (403 US at 407)

Bivens v. Six Unknown Agents (444 US) - the Court reached the existence of

"special concern... counseling hesitation", but held there concern

were consistent with the Speech or Debate Clause, & since that Clause
did not protect Passman - the
Bivens remedy was upheld - 14

Butz v. Economos expressly reserved

the Q whether a Bivens suit

can even be premised on a violation

of the 1st & 14th Amend (438 US at 486 n5)

Carlson v. Green (Bivens suit vs prior

officials) - emphasized that they do not

enjoy such independent status in

our constitutional scheme as to be

made a "judicially created remedy

inappropriate" - 446 US. 14, 19 (1980)