JUSTICE BLACKMUN, dissenting.

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

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

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

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

seems to me, cannot coexist.

I also write separately to express my unalleviated concern about the parties' settlement agreement the key details of which were not disclosed to the Court by counsel until the veritable "last minute," and even then, only because the Halperins' motion to intervene had directed the Court's attention to them. See ante, at 11, n. 24. The Court makes only passing mention of this agreement in Part IIB of its opinion.

For me, the case in effect was settled before argument by petitioner's payment of $142,000 to respondent. A much smaller sum of $28,000 was left riding on an outcome favorable to respondent, with nothing at all to be paid if petitioner prevailed, as indeed he now does. The parties publicly stated that the amount of any payment would depend upon subsequent proceedings in the District Court; in fact, the parties essentially had agreed that, regardless of this Court's ruling, no further proceedings of substance would occur in the District Court. Surely, had the details of this agreement been known at the time the petition for certiorari came before the Court, certiorari would have been denied. I cannot escape the feeling that this long-undisclosed agreement comes close to being a wager on the outcome of the case, with all of the implications that entails.

Havens Realty Corp. v. Coleman, — U. S. — (1982), most recently—and, it now appears, most conveniently—decided, affords less than comfortable support for retaining the case. The pertinent question here is not whether the case

1 The agreement in Havens was not final until approved by the District Court, — U. S., at — (slip op. 6). In the present case, the parties made their agreement and presented it to the District Court only after the fact. Further, there was no preliminary payment in Havens. Each respondent there was to receive $400 if the Court denied certiorari or affirmed, and nothing if the Court reversed. Here, $142,000 changed hands regardless of the subsequent disposition of the case, with the much smaller sum of $28,000 resting on the Court's ultimate ruling. For me, this is not
is moot, but whether this is the kind of case or controversy over which we should exercise our power of discretionary review. Cf. *United States v. Johnson*, 319 U. S. 302 (1943).

Apprised of all developments, I therefore would have dismissed the writ as having been improvidently granted. The Court, it seems to me, brushes by this factor in order to resolve an issue of profound consequence that otherwise would not be here. Lacking support for such a dismissal, however, I join the dissent.

the kind of case or controversy contemplated by Article III of the Constitution.
June 1, 1982

TO:  MR. JUSTICE POWELL  
FROM:  DICK FALLON  
RE:  Fourth Nixon Draft

Pending word on changes that you might wish to make, I have begun "marking up" a Fourth Nixon draft in light of Justice White's and Justice Blackmun's recent circulations. Except as indicated here, all changes are entirely stylistic, based from my increasing familiarity with the Court Style Book.

Page 18. Justice White's latest draft (page 9) quotes someone who had thought of suing the President for damages. Accordingly I would just omit the sentence, which adds little, that litigation of this kind may have been "unthinkable."

Page 19. Justice White has toughened his claim about the relevant history. See his opinion at 15. I think we need to respond somewhat in kind. Language is suggested.

Pages 23-25. Now that Justice Blackmun has written, we have to identify the particular dissent to which we are
responding. Accordingly, I have sprinkled Justice White's name throughout the footnotes.

Response to HAB. I also have attached a draft paragraph responding to the claim—asserted most clearly by HAB—that we cannot "divide" the absolute immunity question so as to reserve the case where Congress had expressly contemplated Presidential liability. I think he is wrong, and that we can make this clear if you think it appropriate to do so. (One consideration of course is whether it would pass easily by SOC, WHR, and the Chief; I don't see why it wouldn't, but there is always a risk.) If you wish to include something along these lines, it could be: (i) added to Footnote 27 on page 16 or (ii) "dropped" as a new footnote at the end of the Story quotation on page 17.
JUSTICE BLACKMUN, post, at 1, purports not to understand how an express congressional creation of Presidential liability could alter the separation-of-powers analysis applicable to a President's claim of absolute immunity. In *Nixon v. General Services Administration*, 433 U.S. 425, 433 (1977), we recognized that the separation of powers doctrine would require a balancing approach to competing claims of constitutional prerogative asserted by two Branches of Government. In the event of congressional action explicitly creating Presidential liability, we may assume that an argument for absolute Presidential immunity would be supported by most of the factors on which we rely today. On the other hand, an express congressional assertion of its legislative power would add an important constitutional consideration to the factors weighing against absolute Presidential immunity from suit under this hypothetical statute. We have no occasion to decide the balance that would be constitutionally required in such a case.
Rider A could be added to footnote 27 on "dropped as a footnote from the Story quotation on page 17"

Under the separation-of-powers analysis of President's claim of absolute immunity, U.S. 433 U.S. 449, 449 (1977), we recognized that the separation of powers doctrine would require a balancing approach to competing claims of constitutional prerogative asserted by two Branches of Government. In the event of congressional action explicitly creating Presidential liability, we may assume that an argument for absolute Presidential immunity would be supported by most of the factors on which we rely today. On the other hand, an express congressional assertion of its legislative power would add an important constitutional consideration to the factors weighing against absolute Presidential immunity from suit under this hypothetical statute. We have no occasion to decide the balance that would be constitutionally required in such a case.
June 1, 1982

RE: No. 79-1738 Nixon v. Fitzgerald

Dear Harry:

Please join me in your dissent in the above.

Sincerely,

Justice Blackmun

cc: The Conference
June 2, 1982

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

Dear Harry:

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

Sincerely,

T.M.

Justice Blackmun

cc: The Conference
Justice White's dissent intimates that we minimize the importance of this historical evidence by its location in a footnote, rather than in text. See, post, n. 2, at 6, and at 15. We had not supposed that the merit of this sort of documentation depends upon its location in a Court opinion. In light of the fragmentary character of the materials - none of which addressed specifically the then remote possibility of a damage suit liability of a President - we do think the most compelling arguments for abso-
Rider B, p. 19 (Nixon)

The dissent supports its historical argument by reliance, we think, on even more fragmentary materials, including primary reliance on ambiguous comments at state ratifying conventions. If the weight of evidence is considered, we place our reliance on the contemporary understanding of John Adams, Thomas Jefferson and Oliver Ellsworth.

Moreover, other pow-
On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was "clearly established" at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, however, the immunity defense ordinarily should fail since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have know of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.
Dear Chief:

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

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

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

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

I suggest, Chief, in all seriousness that it may be wiser now to have a five Justice Court opinion, especially one joined by the Chief Justice. We have expressly left open the issue, but in view of the basic rationale of the opinion I would have no doubt as to the ultimate outcome.

I am concerned, however, that your absence from the majority opinion may dilute its authority. It will be characterized, of course, as a plurality and one that did not even attract the vote of the Chief Justice. The fact
For these reasons I very much hope you will join the opinion expressly, adding whatever you wish to add in your concurrence. For example, you could, if you wish, join the opinion except its reservation with respect to affirmative congressional action. If you should do this, I hope you will not refer to Harry's point as to whether there is "anything to reserve". I have had trouble enough holding my "troops" together because of this and related questions.

After two years, we are on the verge of settling - I think for all time - a major constitutional question.

Sincerely,
June 8, 1982

79-1738 Nixon v. Fitzgerald

Dear Chief:

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

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

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

Sincerely,

The Chief Justice

lfp/ss
PERSONAL

June 8, 1982

Re: No. 79-1738 — Nixon v. Fitzgerald

Dear Lewis:

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

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

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

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

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

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

I would be glad to discuss.

Regards,

Justice Powell
Dear Chief:

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

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

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

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

I am concerned, however, that your absence from the majority opinion may dilute its authority. It will be characterized, of course, as a plurality and one that did not even attract the vote of the Chief Justice. The fact that you may have gone a bit farther than the plurality
still leaves that opinion, with all of its basic analysis, without a majority. A plurality on an issue as inflammatory as this one (see opinions of dissenting judges here and in Harlow), will invite future challenges when the composition of the Court changes.

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

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

Sincerely,

The Chief Justice

lfp/wa