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Reaching for authority to support the dissenting position, Justice WHITE purports to derive support from a recent edition of Time magazine. But the issue that he quotes does no more than report the unremarkable proposition, with which we are in full agreement, that the President is not above the law. This unusual source thus would provide legal support for the dissent only if Time should share the dissent's persistent error—that of confusing immunity from damages liability with being "above the law." The Time article of course made no reference to damages liability for official acts. Rather, its statement referred to the judgment of this Court in the Nixon tapes case and of the House Judiciary Committee in voting an impeachment resolution. The President's continuing amenability to these forms of legal process demonstrates that the President remains as much subject to the law today as ever before. The immunity recognized today extends only to private suits for damages based on decisions and actions within the scope of a President's authority.
June 16, 1982

79-1738 Nixon v. Fitzgerald

MEMORANDUM TO THE CONFERENCE:

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

L.F.P., Jr.
June 16, 1982

Dear Byron:

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

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

Sincerely,

Justice White

lfp/ss
must concern himself with matters likely to "arouse the most intense feelings." *Pierson v. Ray*, supra, 386 U. S., at 554. Yet, as our decisions have recognized, it is in precisely such cases that there exists the greatest public interest in providing an official "the maximum ability to deal fearlessly and impartially with" the duties of his office. *Ferri v. Ackerman*, 444 U. S. 193, 203 (1979) (footnote omitted). This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system. *Nor can the sheer prominence of the President's office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages.*

This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system. *Nor can the sheer prominence of the President's office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages.*

Among the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties. As Judge Learned Hand wrote in *Gregoire v. Biddle*, 177 F. 2d 579, 581 (C.C.A. 2d 1949), cert. denied, 339 U. S. 949 (1950), "the justification for . . . denying recovery is that it is impossible to know whether the claim is well founded until the case has been tried, and to submit all officials, the innocent as well as the guilty, to the burden of trial and the danger of its outcome would dampen the ardor of all but the most resolute . . . ."

These dangers are significant even though there is no historical record of numerous suits against the President, since a right to sue federal officials for damages for constitutional violations was not even recognized until *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). *In defining the scope of an official's absolute privilege, this Court has recognized that the sphere of protected action must be related closely to the immunity's justifying purposes. Frequently our decisions have held that an official's absolute immunity should extend only to acts in performance of particular functions. See *Butz v. Economou*, 438 U. S., at*
Courts traditionally have recognized the President’s constitutional responsibilities and status as factors counselling judicial deference and restraint. For example, while courts have refused to draw lines finer than history and reason would support. See, e.g., Spalding v. Vilas, 161 U. S., at 496 (privilege extends to all matters "committed by law to [an official’s] control or supervision"); Barr v. Matteo, 360 U. S., at 575 (fact "that the action here taken was within the outer perimeter of petitioner’s line of duty is enough to render the privilege applicable ... "); Stump v. Sparkman, 435 U. S., at 363 and n. 12 (judicial privilege applies even to acts occurring outside “the normal attributes of a judicial proceeding”). In view of the special nature of the President’s constitutional office, we think it appropriate to extend to him absolute immunity from damages actions based on acts within the “outer perimeter” of the area of his official responsibility.

Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of which are highly sensitive. In many cases it would be difficult to determine which Presidential “function” encompassed a particular action. In this case, for example, respondent argues that he was dismissed in retaliation for his testimony to Congress—a violation of 5 U. S. C. § 7211 and 18 U. S. C. § 1505. The Air Force, however, has claimed that the underlying reorganization was undertaken to promote efficiency. Assuming that the petitioner Nixon ordered the reorganization in which respondent lost his job, an inquiry into the President’s motives could not be avoided under the “functional” theory asserted both by respondent and the dissent. Thus, in order to administer functional distinctions among Presidential actions, judges frequently would need to inquire into the purpose for which acts were taken. Inquiries of this kind could be highly intrusive.

Here respondent argues that petitioner Nixon would have acted outside the perimeter of his duties by ordering the discharge of respondent Fitzgerald, who was lawfully entitled to retain his job in the absence of "such cause as will promote the efficiency of the service." Brief for Respondent, citing 5 U. S. C. § 7512(a). Because Congress has granted this legislative protection, respondent argues, no federal official could, within his authority, cause Fitzgerald to be dismissed without satisfying this standard of proof in prescribed statutory proceedings.

This construction of the President’s authority would subject him to trial...
generally have looked to the common law to determine the scope of an official's evidentiary privilege, we have recognized that the Presidential privilege is "rooted in the separation of powers under the Constitution." United States v. Nixon, 418 U. S. 683, 708 (1974). It is settled law that the separation of powers doctrine does not bar every exercise of jurisdiction over the President of the United States. See, e. g., United States v. Nixon, supra; United States v. Burr, 25 Fed. Cases 191, 196 (1807); cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579 (1952). But our cases also have established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch. See Nixon v. General...
Services Administration, 433 U. S. 425, 443 (1977); United States v. Nixon, 418 U. S. 683, 708-713 (1974). When judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance, cf. Youngstown Sheet & Tube Co. v. Sawyer, supra, or to vindicate the public interest in an ongoing criminal prosecution, see United States v. Nixon, supra—the exercise of jurisdiction has been held warranted. In the case of this merely private suit for damages based on a President's official acts, we hold it is not.39

39 The Court has recognized before that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions. See United States v. Gillock, 445 U. S. 360, 371-373 (1980); cf. United States v. Nixon, 418 U. S., at 711-712 and n. 19 (basing holding on special importance of evidence in a criminal trial and distinguishing civil actions as raising different questions not presented for decision). It never has been denied that absolute immunity may impose a regrettable cost on individuals whose rights have been violated. But, contrary to the suggestion of Justice White's dissent, it is not true that our jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong. The dissent's objections on this ground would weigh equally against absolute immunity for any official. Yet the dissent makes no attack on the absolute immunity recognized for judges and prosecutors.

Our implied-rights-of-action cases identify another area of the law in which there is not a damages remedy for every legal wrong. These cases establish that victims of statutory crimes ordinarily may not sue in federal court in the absence of expressed congressional intent to provide a damages remedy. See, e. g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 453 U. S. 325 (1981); Middlesex County Sewerage Auth. v. National Sea Clammers Assn., 453 U. S. 1 (1981); California v. Sierra Club, 451 U. S. 287 (1981). Justice White does not refer to the jurisprudence of implied rights of action. Finally, the dissent undertakes no discussion of cases in the Bivens line in which this Court has suggested that there would be no damages relief in circumstances "counselling hesitation" by the judiciary. See Bivens v. Six Unknown Fedeml Agents, 403 U. S., at 396; Carlson v. Green, 446 U. S., at 19 (in direct constitutional actions against officials with "independent status in our constitutional scheme... judicially created remedies... might be inappropriate").

Even the case on which Justice White places principal reliance,
June 16, 1982

79-1738 Nixon v. Fitzgerald

MEMORANDUM TO THE CONFERENCE:

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

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

Lewis - I strongly object to any footnote which suggests lend at
pleadings from Time magazine
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mission such as yours. Times
ments may be important in
a rebel action apart from that.
I would not so dignify them.

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

Reaching for authority to support the dissenting position, Justice WHITE purports to derive support from a recent edition of Time magazine. But the issue that he quotes does no more than report the unremarkable proposition, with which we are in full agreement, that the President is not above the law. This unusual source thus would provide legal support for the dissent only if Time should share the dissent's persistent error—that of confusing immunity from damages liability with being "above the law." The Time article of course made no reference to damages liability for official acts. Rather, its statement referred to the judgment of this Court in the Nixon tapes case and of the House Judiciary Committee in voting an impeachment resolution. The President's continuing amenability to these forms of legal process demonstrates that the President remains as much subject to the law today as ever before. The immunity recognized today extends only to private suits for damages based on decisions and actions within the scope of a President's authority.
July 20, 1982

Re: Nos. 79-1738 and 80-945, Nixon and Harlow

Dear Al,

Thank you for your letter of July 1, that finally reached me here in Richmond.

Justice White and I both agree with your recommendation to apportion the total printing costs two-thirds to Fitzgerald and one-third to Harlow and Butterfield.

I have initialed and return the Orders to this effect.

Sincerely,

Enclosures:
Orders

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

cc: Mr. Justice White
United States Supreme Court
1 First Street, N. E.
Washington, D. C. 20543
June 23, 1982

Memorandum to the Conference

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

No. 81-469, Bush v. Lucas

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

The petitioners in No. 80-945, Harlow v. Fitzgerald, also argued that the respondent's capacity as a government employee represented a "special factor" defeating his claim to a Bivens cause of action under the First Amendment. But the Court did not reach that issue in Harlow. Nor would the circulating opinion in No. 80-1074, Velde v. National Black Police Assn., necessarily be dispositive. The four-member majority in that case relies on a cumulation of factors not all present here.
The question raised is an important one. Moreover, the CA5 decision in this case is in conflict with the decision of CA7 in Sonntag v. Dooley, 650 F.2d 904 (1981).

I will vote to GRANT.

No. 81-872, Turner v. Jordan

The question here is whether the Director of the Central Intelligence Agency is absolutely immune from damages liability for dismissing a CIA employee. The employee was dismissed following his public criticism of the Agency's personnel practices. His suit in the District Court alleged a violation of constitutional rights under the First and Fifth Amendments. Ruling on petitioner's claim of absolute immunity, the District Court stated that absolute immunity might be proper where "defense of a constitutional tort action requires the disclosure of classified information." Here, however, the District Court found that "the defendants have acknowledged that this case involves no such issue of secrecy or security." App. 21a. The District Court certified the case for interlocutory appeal under the collateral order doctrine. CADC (Tamm, Robb, Edwards) affirmed without opinion.

Harlow, No. 80-945, holds open the possibility that federal officials might be entitled to absolute immunity in connection with performance of functions "so sensitive as to require a total shield from liability." Slip op., at 12. Under Harlow, petitioner thus could establish entitlement to absolute immunity in this case if he could "demonstrate that he was discharging a protected function when performing the act for which liability is asserted." Ibid. Here, as noted, the District Court has found that the case involves no issue of "secrecy or security." Nonetheless, the Solicitor General argues that the special functions of the CIA director require an absolute immunity applicable to all personnel actions. Nothing in Harlow suggests that the special status of the CIA director might not raise a unique and unsettled question. But this question—which does seem to me to be unique—of course could be mooted by a decision of the question presented in Bush v. Lucas, supra. If government employment generally constitutes a special factor precluding inference of a Bivens action for adverse personnel actions, that rationale would apply a fortiori to suits against the Director of the CIA. Assuming that the Court will vote to grant in Bush v. Lucas, supra, I will vote to Hold this case for No. 81-469.

2.
Petitioner is a 53-year-old employee of HHS. When his superiors failed to promote him, he filed suit in federal court, alleging age discrimination. His complaint based one count on a federal statute, the Age Discrimination in Employment Act (ADEA), and one directly on the Constitution. The District Court dismissed the Bivens count—which alone is here—on grounds that it was preempted by the ADEA. See Carlson v. Green, supra. CA3 agreed.

In this Court there are two possible questions presented for decision. The first is the same as that presented in No. 81-469, Bush v. Lucas. That is whether the government's employment relationship with an employee is a "special factor counseling hesitation" in the inference of a Bivens action. The other is whether the ADEA preempts a Bivens action that might otherwise exist. See Carlson v. Green, 446 U.S. 14, 18-19 (1980). There appears to be a split on the second question. See Sonntag v. Dooley, 650 F.2d 904 (CA7 1981) (upholding Bivens claim by a former federal employee asserting age discrimination by her superiors).

The preemption argument in this case, based on the ADEA, appears to be stronger than that made under the general civil service laws in Bush v. Lucas, supra. Yet the Bush issue—whether federal employment is a special factor precluding Bivens actions for employment decisions—is the broader and more important issue. Viewing the "special factor" question as the one the Court should reach first, I would be inclined to hold this case if Bush is granted.

Alternatively, I could vote to grant this case and consolidate it for argument with Bush, supra, No. 81-469.


The petitioner in this case is the Attorney General of Missouri. In that capacity he joined other state Attorneys General in bringing an antitrust action against respondent for its convention boycott of States that had not ratified the ERA. Following dismissal of that action, respondent sued petitioner under § 1983. Petitioner claimed absolute immunity from suit, asserting that prosecutorial immunity extended to his initiation of a civil action on behalf of the State. Respondent claimed that petitioner's actions in arranging for the filing of the civil action all occurred in an executive capacity. The District Court denied petitioner's immunity claim without opinion, and CA8, in a brief per curiam order, concluded that the order appealed
from was not final within the meaning of 28 U.S.C. § 1291 and thus not appealable.

In No. 79-1738, United States v. Nixon, the Court reaffirms that orders denying absolute immunity are appealable collateral orders under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Respondent argues that there can be no conflict with this or other cases, because the collateral order doctrine is inherently flexible and not mandatory. But CA8 did not put its decision on this basis. It appears to have held as a matter of law that there was no appealable, because not "final," order. Because our Nixon decision is incompatible with that of CA8 in this respect, I am inclined to vote to GV & R in light of No. 79-1738.

No. 81-1580, Sanborn v. Wolfel

The petitioners in this § 1983 suit are parole officers. As a parolee under their supervision, respondent was arrested for intoxication. He subsequently forfeited bond when he failed to appear for a scheduled hearing. Upon receipt of this and other information, petitioner took respondent into custody for parole violations. There was no on-site hearing to determine whether there was probable cause to revoke his parole, as apparently should have been held under our decision in Morrissey v. Brewer, 408 U.S. 471 (1972). After he was released from incarceration 27 days after his arrest, respondent brought suit against petitioners under § 1983, alleging a violation of due process under Morrissey. A jury awarded damages of $1,000. On appeal, CA6 rejected petitioners' argument that the trial court had erred in imposing on them the burden of proving that they had acted in good faith. And, after reviewing the record, the CA found that the jury reasonably could have found that petitioners did not act in subjective good faith. As evidence of bad faith, the CA appears to have relied on evidence that petitioners arrested respondent not in response to parole violations, but to secure his detention while more serious charges were investigated. Judge Weick dissented. He argued that the petitioners indisputably had acted in accordance with the policies of the Audit Parole Authority of Ohio and approved as lawful by the Attorney General of Ohio. That policy was not to hold on-site hearings where the parolee had jumped bail for an offense committed while on parole. As laymen, petitioners were entitled to rely on the policy adopted by their employer.

The Court opinion in No. 80-945, Harlow v. Fitzgerald, holds that an official is entitled to good faith immunity insofar as his conduct does not violate "clearly established
constitutional or statutory rights of which a reasonable person would have known." Slip op., at 17. Harlow further provides that an official may establish entitlement to good faith immunity where he can prove that he neither knew nor should have known of the relevant legal standard. In light of petitioner's claimed reliance on established Ohio procedures, the immunity inquiry in this case may be in tension with Harlow's reformulated standard.

Unlike Harlow, however, this case arises under § 1983, and thus presents a technically unsettled question: whether the Harlow standard should be applied to cases under that statute. But see Slip. Op., at 17, and n. 30 (suggesting any distinction would be untenable).

I believe that the Harlow standard should be applicable here. I therefore will vote to Grant, Vacate, and Remand in light of No. 80-945, Harlow v. Butterfield. A judgment order in this case might read as follows:

"The petition is Granted. The judgment is vacated and the case remanded for reconsideration in light of No. 80-945, Harlow v. Butterfield. See Butz v. Economou, 438 U.S. 478, 504 (1978) (deeming it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under the § 1983 and suits brought directly under the Constitution against federal officials").
This is a private suit by respondent Fitzgerald to recover damages from former President Nixon for allegedly conspiring unlawfully to cause respondent's dismissal from a government position.

The question presented, not heretofore decided by this Court, is the extent of a President's immunity when sued for damages. Respondent sought damages under two federal statutes, neither of which expressly creates a damages remedy, and under the First Amendment to the Constitution.

Our decisions have recognized two types of immunity defenses: "qualified" and "absolute". Prior cases establish that qualified immunity is the standard generally applicable to executive officials, whether state or federal.

Absolute immunity is expressly conferred by the Constitution on members of Congress and their aides, in the performance of legislative acts. Our decisions also have established absolute immunity as a defense for judges and
prosecuting attorneys for action in the course of their official functions.

The District Court denied petitioner's claim of absolute immunity. And the Court of Appeals for the District of Columbia dismissed his appeal. We granted certiorari, and now reverse.

We hold that a President is entitled to absolute immunity from civil damages liability in suits based on his official acts. We think this immunity is incident to a President's constitutional office, rooted in the separation of powers and supported by our history. Until recently, civil damage suits against a President were unknown.

The President occupies a unique position in the constitutional scheme. Article II of the Constitution vests the entire "executive power" of the United States in the President. His responsibilities include the management of the Executive Branch, the enforcement of all federal law, the conduct of foreign affairs, and the defense of our country. He is required - sometimes almost daily - to make decisions of the utmost discretion and sensitivity.

We think it would be intolerable.
We think it would be intolerable, and contrary to the public interest, if each such decision were made in the shadow of threatened damages suit by employees or citizens who feel aggrieved.

A rule of absolute immunity will not leave the nation without adequate protection against serious misconduct by the chief executive. In the Nixon tapes case, we compelled a President to make evidence in his possession available in a criminal prosecution.

The constitutional remedy of impeachment, of course, remains available. Moreover, oversight by Congress and the media, more pervasive than with respect to any other official, normally will serve to deter presidential abuse of office.

In conclusion, I emphasize the narrowness of our holding. It applies only to private damage suits, and only to action taken within the scope of a President's official authority. The President, like judges and prosecutors, is not immune for acts outside of his official duties.
The Chief Justice has filed a concurring opinion. Justice White has filed a dissenting opinion in which Justices Brennan, Marshall and Blackmun join. Justice Blackmun also has filed a dissenting opinion, in which Justices Brennan and Marshall join.
June 24, 1982

Nixon and Harlow

Dear John,

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

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

As ever,

Justice Stevens

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