In the

Supreme Court of the United States

HENRY KISSINGER, ET AL.,	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 79-880
	)	
MORTON HALPERIN, ET AL.,	)	
	)	
Respondents.	)	
	)	

Washington, D. C.
December 8, 1980

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ORIGINAL

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Petitioners,

v. No. 79-880

MORTON HALPERIN, ET AL.,

Respondents.

Washington, D. C.

Monday, December 8, 1980

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:54 o'clock p.m.

APPEARANCES:

WADE H. McCREE, JR., Solicitor General of the United States, U.S. Department of Justice, Washington, D.C. 20530; on behalf of the Petitioners.

MARK H. LYNCH, ESQ., American Civil Liberties Union Foundation, 122 Maryland Avenue, N.E., Washington, D.C. 20002; on behalf of the Respondents.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Kissinger v. Halperin.

Mr. Solicitor General.

ORAL ARGUMENT OF WADE H. McCREE, JR., ESQ.,

ON BEHALF OF THE PETITIONERS

MR. McCREE: Mr. Chief Justice and may it please the Court:

This case requires this Court for the first time in the history of the nation to determine the extent of the personal immunity of the President of the United States and his closest advisors for money damages arising from the claimed violation of constitutional rights resulting from the performance of his official duties.

In Butz v. Economou, decided during the 1977 term, the Court held that although a qualified immunity from damages liability should be the general rule for executive officials charged with a violation of the Constitution, there are some officials whose special functions require a full exemption from such liability. We submit that the President of the United States, the constitutional head of the second branch of government, is preeminently such an official, and that officers carrying out his express directions should be protected by an immunity derivative of his.

The facts in this case may be succinctly stated.

Between February and April, 1969, when the nation was engaged in armed conflict in Southeast Asia, the President and several of his top advisors were deeply concerned about unauthorized disclosures to the news media of confidential information, including foreign policy documents. The President feared that the unauthorized disclosure of this material would jeopardize the Government's foreign policy initiatives, and would seriously undermine the confidence of our allies in our reliability about classified disclosures to us.

The nature of some of the unauthorized disclosures made the National Security Council a likely source of the security leaks. Accordingly, the President met with the Attorney General, the Director of the National Security Council, and the Director of the FBI, to discuss remedial measures. Upon the advice of the FBI Director, that electronic surveillance would be a method of discovering the source of the leaks, the President authorized the use of wiretaps.

The FBI Director prepared a list of officials in the office of the National Security Council Advisor who had access to documents similar to those that were released, and who possessed other characteristics that suggested that they might be likely sources of the unauthorized disclosures. This list included the name of Dr. Halperin, principal respondent in this case.

The Attorney General approved the installation of

a tap on the residence phone of Dr. Halperin and that was accomplished in May, 1969. Summaries of information obtained from this disclosure were prepared and disseminated, ultimately through the Assistant to the President, Mr. Haldeman, another one of the petitioners, who would bring pertinent data to the attention of the President and to the Director of the National Security Council.

The tap failed to reveal that Dr. Halperin was the source of the leaks, and it was removed from the telephone on his residence in February, 1971.

QUESTION: Was that 21 months after it had been installed?

MR. McCREE: Yes, Mr. Justice Stewart.

Two years later, when Dr. Halperin learned of the tap, he, his wife, and children filed in the United States District Court for the District of Columbia this action, alleging that the wiretap was unlawful under the Fourth Amendment and under Title III of the Omnibus Crime and Safe Streets Act of 1968. Petitioners, other federal defendants, and the telephone company were named as defendants and monetary damages, declaratory and injunctive relief, were sought.

After extensive discovery, petitioner's motion for summary judgment on the Title III claim -- that's the Omnibus Crime and Safe Streets Act -- was granted, and that issue is not before the Court in this appeal.

QUESTION: I notice, Mr. Solicitor General, that the Respondents here are Morton Halperin, et al., and that's the members of his family?

MR. McCREE: These are his wife and children, yes, Mr. Justice Stewart.

QUESTION: And that's it? They were the plaintiffs?

MR. McCREE: They are the respondents.

QUESTION: The plaintiffs were all Halperins?

MR. McCREE: The plaintiffs are all Halperins. They are respondents here.

Addressing the Fourth Amendment claims, although it recognized that there was justifiably grave concern in 1969 over leaks and -- and I'd like to quote -- "even granting the inapplicability of the general warrant requirement, the district court held that the wiretap was constitutionally unreasonable because it was continued for 21 months without an effort to minimize the number or type of conversations overheard." The court imposed liability in the following manner: upon the former President for not imposing temporal or informational limits on the taps; upon the Attorney General for having failed to carry out review and renewal obligations over the 21-month period; upon the Assistant to the President for having reviewed the information for over a year without recommending termination, for disseminating information, and for purposes unrelated to the original justification.

It found no liability --

QUESTION: Can I just clear up one point of confusion on my part? There is no Title III issue here, not because the district court entered summary judgment, but rather because --

MR. McCREE: We did not petition.

QUESTION: You did not petition that; right.

MR. McCREE: That's correct, Mr. Justice Stevens. The district court found no liability on the part of Dr. Kissinger. The district court also determined that the President and the other petitioners were not entitled to an absolute immunity for damages liability and although their conduct was not -- and I would like to quote -- "a wanton, reckless, or malicious disregard" of respondents' rights, nevertheless they were not entitled to a qualified good faith immunity from damages liability because -- and I'd like to quote again -- "their activities relating to the wiretap's continuance were unreasonable, and in violation of established Fourth Amendment rights" and because "they are charged with knowledge of established law."

Since respondents proved no actual injury, they were given the relief of having certain exonerating material placed in Dr. Halperin's file and they were awarded nominal damages, one dollar.

The Court of Appeals reversed and remanded for

further proceedings. It held, first, that the Fourth Amendment requirement of a warrant for electronic surveillance -- and there was none here -- in national security cases would be applied retroactively to establish a cause of action in damages. It also concluded that petitioners' failure to terminate the tap within a reasonable time also gave rise to a damages action for violation of the Fourth Amendment. It also concluded that petitioners are not entitled to an absolute immunity from damages nor to a qualified immunity as a matter of law with respect to the continuance of the taps, because there were no reasonable grounds for believing that the surveillance was in accord with the Constitution.

It remanded to the district court to determine when the continuation of the wiretap became unreasonable, and whether petitioners acted in good faith in authorizing a warrantless electronic interception for national security purposes prior to this Court's decision in United States v. United States District Court, a case that's known as the Keith case.

It held that respondents could be awarded damages for emotional distress and for other intangible injuries, and it reversed the award of summary judgment in favor of Dr. Kissinger and remanded.

Now, at the outset, we contend that to subject the President of the United States to personal damages for official acts in his capacity as the nation's chief executive is

contrary to compelling reasons of public policy as well as to the design of the Constitution. We submit that absolute immunity is absolutely necessary to protect the decision-making processes of the President in his conduct of the official business. The risk of personal liability would inhibit the fearless and decisive exercise of presidential authority which the nation has a right to expect.

Just as a judge, who this Court has determined enjoys absolute immunity, must make decisions in controversies fraught with passion, and so must Presidents often make discretionary decisions about controversial issues that affect the lives of virtually every American, especially in areas of national defense and foreign affairs which are involved in this litigation, the President's discharge of these duties should be motivated solely by his concern for the good of the nation, and not at all by the fear of damages awards.

And these fears, we submit, are not de minimis. In Butz v. Economou, the ad damnum was $32 million. It is manifest, we submit, that a qualified immunity is inadequate to protect the public interest in the vigorous and fearless performance of a president's constitutional duties.

The skillful pleader can easily avoid a motion to dismiss by alleging malice, bad faith, and unreasonableness, and impose on the President the burden of the time, the expense, the personal anxiety, and the inevitable distraction

of litigation. Judge Gesell, the only district judge who was a member of the appellate panel in this case, directed our attention to what he called the increasing frequency by which plaintiffs are "filing suits seeking damage awards against high government officials in their personal capacities, based on alleged constitutional torts." And he expressed grave doubts whether the usual tests apply to determine the existence of genuine issues of controverted fact would afford any protection to a president from extensive discovery delving into his innermost thoughts and probing his mind to determine whether and how he acted in his official capacity.

We submit that in a subsequent matter, as we point out in Footnote 34 on page 37 of our brief, that this Court's expectation in Butz, that "insubstantial lawsuits can be quickly terminated by federal courts," alert to the possibility of artful pleading, and that "firm application of the Federal Rules of Civil Procedure will insure that federal officials are not harassed by frivolous lawsuits," has not been realized, as a separate opinion of Mr. Justice Powell asserts in Hanrahan v. Hampton, which has been characterized as the longest jury trial in the history of United States courts, and must go back again for several months of trial to determine whether a qualified immunity which was given to the federal defendants in that case was available to them.

We next contend that absolute presidential immunity

should extend to officials who acted at his direct and express direction to carry out his authority. It is obvious that a president can only act per alios and if his alter egos do not enjoy the same absolute immunity which we submit he should receive, then the public interest in his fearless discharge of his constitutional duties will be utterly frustrated.

We also contend that an absolute immunity for damages should attach to the giving of advice to the President pursuant to Article II, Section 2, of the United States Constitution by the heads of his departments. The fear of personal liability on the part of a department head who is asked to render advice to the President would deprive the chief executive officer of exactly what the Constitution intended for him to receive, the best judgment, the honest, frank and considered opinion of his subordinate.

However, in this case, to deny absolute immunity would dry up the source of the kind of advice that would be necessary for the discharge of the public's business.

QUESTION: Does this go for the entire staff of the President?

MR. McCREE: Mr. Justice White, we think that we can avoid that question here, because we submit --

QUESTION: You'll just go no farther than necessary down the line?

MR. McCREE: That's right.

QUESTION: Well, is it your submission that it works both ways, that if -- not only for advice to the President, but the execution of acts or duties or statements that the President directs a subordinate to commit?

MR. McCREE: We think, Mr. Justice White, that these are separate things. One is the immunity derivative of the President, which would shield a person who might not have it in his own behalf.

QUESTION: Which one is that?

MR. McCREE: Well, we feel that that should be the basis for the disposition of this litigation --

QUESTION: All right. But whether or not it's carrying out an order of the President or giving him some advice, either one?

MR. McCREE: We think there should be an absolute immunity for both.

QUESTION: For both -- either kinds of -- ?

MR. McCREE: For either or both, but we think the Court can avoid determining whether the subordinate has an absolute immunity at all.

QUESTION: I understand that; I understand that. But which is it in this case? Is it carrying out the orders of the President or giving him advice, or both?

MR. McCREE: It's executing the orders of the President and so therefore it would be derivative of his absolute --

QUESTION: And so we don't need to get to giving him advice?

MR. McCREE: We submit it; it is not necessary to dispose of this case.

QUESTION: Well, how big a list does that include?

MR. McCREE: Well, we think, again -- I can't answer that, Mr. Justice Marshall.

QUESTION: Well, don't we have to in an opinion, say, that certain people have this great immunity and others don't?

MR. McCREE: I think we can focus --

QUESTION: Or do we leave the same worry in their minds?

MR. McCREE: I think we can focus on the petitioners in this case and say that they have it, and we can wait until another day to determine whether someone with lesser rank in the executive department should enjoy it.

QUESTION: Well, they have in this case because of the derivative immunity that they enjoy from the presidential immunity. That's your argument, at least.

MR. McCREE: If we follow that approach, we needn't reach the question, Mr. Justice.

QUESTION: Well, is that anybody the President asks? Would that apply to a private individual whose advice is sought?

MR. McCREE: I would think not, Mr. Justice Marshall.

QUESTION: Well, should we say so?

MR. McCREE: I think it's not involved in this case. If the Court wishes to express itself, of course it will.

QUESTION: I think the whole thing is -- I personally think the whole thing's involved, as to how far a president can go in authorizing individuals to violate people's rights.

MR. McCREE: Well, the derivative immunity which we claim for him would protect these persons here without determining what inherent immunity they themselves possess.

QUESTION: And this is true because they're acting in effectuation of a specific program for which he, personally, was specifically responsible?

MR. McCREE: Yes, Mr. Justice Stewart.

QUESTION: And because the same argument, I suppose, could be made for any White House aide who's acting in accord with general authority given by a president.

MR. McCREE: We submit, to focus on another branch of government, it's clear that a judge acting in his judicial capacity has an absolute immunity. We suggest that if he directed a member of the staff of the court, specifically, to do something which if he did himself would afford him the absolute immunity, that that person would enjoy an immunity derivative of him. The Clerk of the Court, for example.

QUESTION: What kind of derivative immunity have we allowed to members of the Senate or the Congress?

MR. McCREE: Where the -- in the Gravel case, where the legislator himself would enjoy immunity, if the chief counsel of a committee acted at his direction, he would be protected by the derivative immunity. If, on the other hand, the legislator would not under the Speech or Debate Clause, then neither would the person who acted at his express direction. We contend here that this is specifically within the President's constitutional authority, the areas in which he acted, and that he expressly authorized this step to take place. I don't think there's any question about that. And therefore, that he should have, these persons should have a derivative --

QUESTION: Would that also apply to the FBI agents who did the actual listening?

MR. McCREE: I think it should. I think, analytically, it should, if expressly directed.

QUESTION: And the phone company?

MR. McCREE: Well, the telephone company is out of the case, Mr. Justice Marshall, and I would prefer to let them speak for themselves if I don't have to.

QUESTION: Mr. Solicitor General, you have mentioned the Speech and Debate Clause. Does the absence of something similar to it in the Constitution so far as the Executive Branch is concerned have any significance?

MR. McCREE: I don't think so, Mr. Justice Blackmun.

although the opinion in this case and the Court of Appeals for the District of Columbia dwelled at some length on the absence of a specific constitutional grant of immunity. We submit that the third branch has no express grant of immunity, yet every judge, justice enjoys an absolute immunity acting in his judicial capacity; but there's nothing in the Constitution that speaks of that. This Court has also decided in Imbler v. Pachtman that a prosecuting attorney functioning qua prosecuting attorney also enjoys an absolute immunity and there's nothing in Article II of the Constitution that affords him that immunity either. So we think it's not of consequence --

QUESTION: Mr. Solicitor General, I have a vague recollection that Chief Justice Warren addressed this question in some case; that is, the derivative immunity. Do you recall off the top of your head what case that was?

MR. McCREE: It may have been the Gravel case.

QUESTION: No, he wasn't here then.

MR. McCREE: He would not have been -- that would have been after.

QUESTION: Well, no matter. No matter.

MR. McCREE: I do not. It may occur to me, and if it does, I would like the privilege of calling it to the Chief Justice's attention.

We also suggest that even if the Court should decide that petitioners are entitled only to a qualified immunity,

they are nevertheless entitled to a qualified immunity as a matter of law. Qualified immunity occurs, as we understand it, when two elements are satisfied: first, there must be the absence of malice or bad faith; and second, there must be an objective test that the conduct is reasonable, that there was no settled or clearly established law relating to the alleged violation.

Now, the Court here did not hold that there was malice or bad faith. The Court instead claimed that there was clear established law violated which we contend, and we believe we demonstrate in our brief, is erroneous. We submit that in 1969 when these taps were established, it was far from being clear and established what the requirement was, either for warrants or reasonableness in national security wiretaps.

As a matter of fact, it was only two years before these wiretaps were initiated that this Court first held that electronic surveillance was covered by the Fourth Amendment, and the first case to impose a warrant requirement for electronic surveillance of this sort was the so-called Keith case which was decided after the taps were terminated here, and that concerned surveillance for domestic security, and not foreign national security surveillance. And it wasn't until after that that any court first spoke to the question of the application of the Fourth Amendment to the national service surveillance for foreign security purposes.

And as this Court itself said in the Keith case, it was addressing a matter which had never been addressed before by this Court. And we believe that in the light of this demonstration, for the court below to have said that this was in violation of settled or clearly established law is highly erroneous, that it is erroneous as a matter of law.

QUESTION: The new question involved in the so-called Keith case, as you call it, U.S. v. U. S. District Court, was whether or not a warrant was required. Wasn't that the new question?

MR. McCREE: That's correct. Well, but that's involved in this case, too. We're just saying that the law was developing in this area of what is required for electronic surveillance, what is required for electronic surveillance for national security reasons involving domestic persons, and what is involved in --

QUESTION: Well, certainly it was never contended that an unreasonable search or seizure was a constitutional search or seizure, was it?

MR. McCREE: Well, that's --

QUESTION: There was a difference of opinion as to what was reasonable.

MR. McCREE: That's correct, Mr. Justice Stewart. And we submit that in the field of the area of national security, it may not be appropriate to take the test of

reasonableness from criminal cases, and apply it.

For example, I say it without knowing this to be the fact, but I believe that there is a basis for it, that we may be conducting national security wiretaps that have had several years' duration, in some areas; and it may be reasonable in the context of foreign surveillance for national security reasons. Whereas to conduct surveillance for a criminal law purpose of a domestic person, might be unreasonable if it's more than a matter of a few days. And so we submit that this is an evolving area of the law, and that it certainly isn't settled or clearly established law, and that the court below erred in asserting that it was, in denying even a qualified immunity, which it would have in the absence of malice, and in the absence of bad faith, in the absence of violation of clearly established law.

We also suggest that, as Butz v. Economou suggested, the Doctrine of Qualified Immunity is not rigid, it's also an evolving doctrine, being a court-made doctrine. And that it varies with the scope of discretion and responsibility of the office. And although the form it took in Butz v. Economou was a bad faith, the existence of bad faith or the violation of settled or clearly established law, we suggest that for the President and his closest advisors, a much more useful formulation of qualified immunity would eliminate the subjective element of bad faith or malice, and hold only the objective

test of a violation of settled or clearly established law.

And we suggest this for the following reason. This would permit a court to determine the question of damages liability as a matter of law, and make unnecessary the deposing of the President and his closest aides, the submission to them of interrogatories to answer, and possibly the necessity of trial. And still it would afford protection, because any violation of settled or clearly established law which could be determined objectively would curb the kinds of excesses that this Court should be concerned about in balancing the right of the citizen to recompense against the interest of the entire nation in the conduct of the office of the President, which we submit is seriously undermined by either the absence of an absolute immunity or the failure to construct the kind of qualified immunity that he might have, which could be determined as a matter of law rather than as a matter of fact.

Finally, we argue that judicial decisions establishing constitutional standards for national security surveillance which were announced after the Halperin wiretap should not be applied retroactively to permit an award of personal damages for federal officials. Clearly, those decisions are all subsequent to the termination of the tap on Dr. Halperin's phone, and yet the Court of Appeals applied them retroactively, mistakenly, we believe, under the standards expressed in Chevron.

The standards in Chevron were three. The first was whether the new rule was foreshadowed by existing law, or whether it established an overruling of a longstanding precedent. And we suggest that this Court's opening language in the Keith case indicates that this certainly is not an area that was foreshadowed. We also suggest that the second test in Chevron is whether it serves the purpose of the new rule. The purpose of the new rule, as we understand it, is to deter conduct, and this Court has said many times -- in Linkletter, for example -- that conduct that has already occurred is not deterred by imposing personal liability after the fact. And the third standard is whether the retroactive application would be unfair, and we submit it would be eminently unfair because the entire genius of our legal system is not to hold a person to a standard of conduct of which he had no notice.

QUESTION: Do you think, Mr. Attorney General, there's really much difference between deciding the good faith immunity question and retroactivity? If the law wasn't settled it isn't retroactive in the case then?

MR. McCREE: They're certainly related, and --

QUESTION: Well, what's the difference, I wonder? Has there been a remand here?

MR. McCREE: In making the determination, Mr. Justice White, I think there is no difference. It just depends upon which analysis you wish. I'd like to -- and there has not been

a remand yet. I would like to suggest that if this Court decides that there should not be a retrospective application of the decisions creating damages liability for violation of the Fourth Amendment, that it would be possible to avoid an expression at all upon the matter of absolute immunity, if the Court desired to reach that point. And we feel that these two areas afford the people of the United States the protection that they require under these circumstances. Thank you.

MR. CHIEF JUSTICE BURGER: Very well. Mr. Lynch.

ORAL ARGUMENT OF MARK H. LYNCH, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. LYNCH: Mr. Chief Justice, and may it please the Court:

I'd like to say a word more about the facts of this case against which petitioners' legal argument must be measured. To begin with Petitioner Kissinger, our case against him is not based on any advice. Indeed, our case against any of the petitioners is not based on the giving of advice. In fact I'd be hard pressed to frame a complaint under Bivens that was based on the giving of advice.

Our case against Petitioner Kissinger is based on his role in selecting Morton Halperin as a surveillance target. I believe the Solicitor General misspoke when he said that FBI Director Hoover assembled the list of wiretap targets. In fact, the list was assembled by Dr. Kissinger at the

National Security Council, that put Halperin on the list to be wiretapped. He put Halperin on the list to be wiretapped despite the fact that Dr. Kissinger knew that Halperin did not have access to the information related to the B-52 bombing story, which was the leak that triggered the wiretaps. And in fact, Dr. Kissinger also knew that Mr. Halperin had very little access to the information which appeared in previous leaks.

In fact, when Dr. Kissinger asked his aide, General Haig, to prepare a list of people who had access to the B-52 bombing story, Haig did not put Halperin's name on the list, but instead, at Kissinger's direction, Halperin's name was put on the list and it was transmitted over to the FBI.

QUESTION: That was Colonel Haig at that time?

MR. LYNCH: I'm sorry. Well, it was Colonel Haig at that time, and later he was promoted to general.

Furthermore, with respect to our case against Kissinger, it is based on his role in keeping the wiretap on. There were a number of instances when the FBI suggested that the wiretap be taken off, in the very early days, because it was not revealing any indication that Halperin was a leaker. Yet, Kissinger persisted through Haig in keeping a tap on Halperin.

QUESTION: To whom was that information conveyed by the FBI?

MR. LYNCH: In some instances it was related by

Assistant Director Sullivan through Haig. And there is one point, on June 4th, when Haig prepares a memorandum for Kissinger to serve as the basis of a discussion with Hoover, and Kissinger testified that he followed the outlines for that memorandum, and Haig suggested to Kissinger and Kissinger in fact spoke to Hoover about the fact that although there is no indication that Halpirin is a leaker, we should keep his wiretap on for at least two more weeks to establish a pattern of innocence. So he was very directly involved. And the testimony from the FBI officials indicates that they regarded Kissinger as the person who would put the taps on, and indeed make the decisions to take the taps off.

There is also testimony from Attorney General Mitchell that Kissinger was the person who had the authority to finger targets and to decide when it was time to take them off.

QUESTION: Who had possession of the logs? The FBI or the White House?

MR. LYNCH: Excuse me, Your Honor?

QUESTION: The logs of the wiretaps. Who had possession of those?

MR. LYNCH: The actual logs were kept at the FBI and summaries were made and sent over to the White House. Early in the surveillance Haig went to Sullivan's office and literally sat down and read the logs. Sullivan also testified at

one point Kissinger came over to read the log. Kissinger disputes that; we're not sure. This is all on summary judgment.

But later on this took too much of Haig's time to come over and read the log so the FBI began preparing summary letters and sending them over to the White House. They were delivered to Haig, who was then to furnish them to Kissinger. They were also delivered first to Ehrlichman, who would give them to Haldeman, who then took them in to the President, and there is testimony that he actually did take them in to the President and discuss them with him.

QUESTION: Could I ask, at some point in this process there was a presidential authorization or an order for the imposition of wiretaps?

MR. LYNCH: Yes. Let me get to the theory of our case against Nixon.

QUESTION: Well, now, there was an order like that?

MR. LYNCH: There was an order.

QUESTION: And he didn't do it out of the blue. I suppose someone recommended to him that he -- ?

MR. LYNCH: That's right.

QUESTION: And they advised him to do it? Including Dr. Kissinger, I suppose?

MR. LYNCH: No, no. So far as the record shows, Nixon authorized a program to investigate leaks that would include the use of wiretapping, if necessary. Less intrusive

means were supposed to be used initially, interviews and physical surveillance and so on.

QUESTION: He never ordered it?

MR. LYNCH: But so far as we know, Nixon did not target Kissinger at the beginning of the wiretap.

QUESTION: I know. But did he ever order it, or just authorize it?

MR. LYNCH: The wiretapping of Halperin?

QUESTION: No, just any wiretap, for this purpose? Did he order it or not?

MR. LYNCH: He said, use it if necessary. And I think it's fair to say that he said, go ahead and wiretap.

QUESTION: All right. And so that he said that to whoever had the responsibility to make those decisions?

MR. LYNCH: He said -- yes, he said that to -- well, he very simply said, I want it done.

QUESTION: So, if Kissinger participated in the imposition of the taps, it isn't -- you aren't suggesting that he was acting without authority?

MR. LYNCH: In the selecting of people? No. He was told to do that.

QUESTION: So he was exercising the authority that the presidential order anticipated that he carry out?

MR. LYNCH: Yes. But now, it's important to understand that Nixon gave him three criteria for selecting people.

QUESTION: I understand you have --

MR. LYNCH: And Halperin fit within none of those.

QUESTION: But nevertheless, Kissinger was acting within the scope of his authority?

MR. LYNCH: Yes, except that he --

QUESTION: And within the scope of the order?

MR. LYNCH: Yes, subject of course to the limitation that the Fourth Amendment places on the exercise of this authority.

QUESTION: Oh, I understand that; yes.

MR. LYNCH: I didn't want to lose that. I want to reiterate that our case against Nixon is not based on telling his subordinates to go out and investigate leaks. We wouldn't sue him if that's all he did. Our case against Nixon is based on his very personal and direct and continuing involvement in the use of this information for partisan political activities. This point is probably best demonstrated by the meeting that he had with Hoover --

QUESTION: Well, that per se is not a constitutional violation, is it?

MR. LYNCH: No. This --

QUESTION: I thought your lawsuit was based upon a violation of the Constitution?

MR. LYNCH: That's our cause of action --

QUESTION: The order. The order. The order you say was unconstitutional. They ordered the wiretap.

MR. LYNCH: Yes. Without warrants. We say that is unconstitutional, and even if you could get away with wiretapping without a warrant in 1969, to wiretap for this length of time, to wiretap people for whom there was no good reason to wiretap under the purported purpose of the wiretap, would --

QUESTION: Now, what you've told us might be a reason that it was a constitutional violation.

MR. LYNCH: Yes.

QUESTION: And it wasn't a bona fide foreign security tap.

MR. LYNCH: Yes. Yes, sir.

I'm explaining now why Nixon is in this case. And I think this demonstrates why qualified rather than absolute immunity is an appropriate rule to apply to the President, quite contrary to the Government's position.

On May 12, 1970, Nixon met with Hoover. This was the height of the controversy over the President's decision to insert troops into Cambodia. Hoover prepared a brief of the highlights of the surveillance that had been gleaned in the two weeks since the Cambodian invasion decision, and he reviewed those with the President at this meeting.

With respect to Halperin, the highlights of the surveillance included the information that Halperin planned to

resign his consultant status with the National Security Council in order to protest the invasion; that Halperin planned to go to work for Senator Fulbright to work against the war; and that Halperin and other individuals were setting up an organization to oppose the war.

At that meeting Nixon directed Hoover to no longer send reports, the summary letters, to Kissinger but to direct them exclusively to Haldeman, the President's alter ego. And at that point the information reported in the summary letters, the political content of that information, becomes much, much more pronounced. You get information such as the fact that Halperin is lobbying with the Republican Senators with respect to legislation that was pending then to cut funds off for the war, and the White House wonders, for example, if Senator Cotton is marginal on this issue. You get information about Halperin's attempts to set up this organization that I mentioned earlier. Halperin then began cooperating with John Gardner in Common Cause. The White House learned the nature of the foreign policy positions --

QUESTION: At this period was Dr. Halperin still on the staff?

MR. LYNCH: No. He had been a consultant. Let me give you the chronology. May 1969, the wiretap was put on. He's cut off from access to classified information. September 1969 -- he can't do much without classified information at the

NSC, so he resigns, over Kissinger's objection. Kissinger offers to try to persuade him to stay on, so they compromise and agree that Halperin will be a consultant. Halperin maintains that consultancy from September, 1969, although it was minimal, until May, 1970, when he resigns altogether from the Government in protest of the Cambodian invasion.

QUESTION: And did he ever thereafter return to government employment?

MR. LYNCH: No, he hasn't. He -- well, he's had some other consulting contracts, I think, with the Atomic Energy Commission. But that may even have been before May, 1970. But he never returned to full-time government service.

QUESTION: Mr. Lynch, for purposes of the President's immunity, is there a difference between the period from May, '69, to May, '70, and the period after May, '70?

MR. LYNCH: Our case gets -- clearly gets much stronger after May, 1970.

QUESTION: But legally, is there a legal difference between the two?

MR. LYNCH: With respect --

QUESTION: The difference is one just of motive, and motive would be irrelevant under absolute immunity.

MR. LYNCH: That's right. It goes to the showing you have to make under the qualified immunity. And our position --

QUESTION: So if you're right after May '70, you're also right before May, 1970?

MR. LYNCH: Yes.

QUESTION: And of course, if there's absolute presidential immunity, there's absolute presidential immunity, and that would apply if a President should go out and put his hand over the mouth of a private citizen so the private citizen couldn't speak.

MR. LYNCH: Sure. He could have decided the way to find out about these leaks was to go pick Halperin up in the middle of the night and torture him, and under the Government's position he's absolutely wrong.

QUESTION: Exactly.

MR. LYNCH: We think that's no way to run a government.

QUESTION: Is that a fair statement of the Government's position, because they argue there should be a functional analysis of what the President does, just as the judge would not be immune if he went out and wrestled somebody to the ground in something totally unrelated to judicial proceeding. Don't they make the same --

MR. LYNCH: They haven't suggested any limiting factor that I can discern, Your Honor.

QUESTION: They do make this functional analysis --

QUESTION: Well, so long as he's carrying out the

presidential office, and that was true in Stump v. Sparkman.

MR. LYNCH: But if -- yes, yes. But, you see, the presidency, as they say -- correctly, I think, although for the wrong purpose -- the scope of the President's office is so broad, it's not limited like the judicial function of a judge, where he would wrestle someone down in the courtroom.

QUESTION: Well, would you say he's absolutely immune when he signs a bill into law, for example?

MR. LYNCH: Yes. I think he probably --

QUESTION: So, you would agree there is some absolute immunity for the President?

MR. LYNCH: I would. I think analytically a more precise way to say it is that the scope of his discretion is so wide in some areas that qualified immunity tends to merge into absolute immunity. I would prefer to call it --

QUESTION: Well, there's no cause of action there?

MR. LYNCH: A district court would throw the case out very quickly.

QUESTION: Well, it could very quickly, but is he entitled to absolute immunity, which would mean he's entitled to win on a motion to dismiss without any showing of facts other than that all he did was sign a bill? Seems to me, if you admit that, you're admitting the Government's functional analysis approach.

MR. LYNCH: And it's a slippery slope, to try to

decide where to draw the line. And that's why I would prefer to call it qualified immunity --

QUESTION: And I know you'd prefer not to, but --

MR. LYNCH: -- with a very broad expansion in some areas.

QUESTION: But do you seriously contend that he has no absolutely immunity? Say he orders troops into battle or something like that? It's still just a qualified immunity?

MR. LYNCH: Practically, I don't contend that; no. And I think ordering troops into battle, negotiating treaties, that sort of thing. But where he comes down and intrudes himself into the life of one family of five people and starts listening to their most private telephone conversations for partisan political purposes, that --

QUESTION: But didn't you just admit the partisan political purposes are only relevant to motive? They're not relevant to whether or not there's an absolute immunity.

MR. LYNCH: That's true. Well, I think that's an aspect --

QUESTION: Well, Mr. Lynch, is there any decision in this Court or any other court that you know of that in talking about executive immunity that suggests that it ever has extended or should extend to criminal immunity -- immunity from crime?

MR. LYNCH: I don't think so, Your Honor. I think --

QUESTION: Aside from the Speech or Debate Clause, which is of constitutional dimension?

MR. LYNCH: And which is very limited to legislative activity.

QUESTION: So, you don't think the Government's suggesting that the President's absolutely immune under the criminal laws, do you?

MR. LYNCH: No, I don't think they do suggest that. But criminal action --

QUESTION: Then don't say that they are suggesting it, that their immunity is unlimited.

MR. LYNCH: Well, it's unlimited with respect to civil suits.

QUESTION: And even within the area of performing his presidential duties, I don't see any suggestion that he's immune from violating the criminal laws.

MR. LYNCH: I didn't mean to suggest that, Mr. Justice White. My whole discussion is within the context of civil suits, to redress violations of -- civil rights.

QUESTION: Well, then, but you said a minute ago the Government was suggesting that the President could go out and torture someone into making a confession and that he would be immune under their theory. Do you think they really suggest that?

MR. LYNCH: If, for a civil suit by the victim?

QUESTION: No, I said, you said he would be immune from having subjected someone to torture.

MR. LYNCH: Under the Government's argument --

QUESTION: You mean under civil liability?

MR. LYNCH: Civil liability would be immune.

QUESTION: Not criminal?

MR. LYNCH: Not criminal. And as I say, I didn't mean to suggest that this whole discussion relates to civil suits for constitutional violations.

QUESTION: Then, on the civil side, would you say that that automatically excluded any recovery against the Government as such? Civil?

MR. LYNCH: That depends on the vagaries of whether you can recover under the federal tort claims actions. And that is a --

QUESTION: There may or may not be a recovery there, under the civil side?

MR. LYNCH: Yes. And there are lots of problems in proceeding under the --

QUESTION: And, Mr. Lynch, do you think the Government suggests that a course of conduct by the President is not subject to an injunction suit or a declaratory judgment?

MR. LYNCH: No, they don't suggest that.

QUESTION: So that it's just damages we're talking

about, not just immune from civil suit, but from damages?

MR. LYNCH: They want to --

QUESTION: That's what we're talking about?

MR. LYNCH: That's right. Turning to the policy rationale for the qualified immunity applying to the President, which is the position we urge, in favor of qualified immunity, of the policies which this Court recognized in Butz v. Economou, the first of all is the importance of enabling a citizen to recover for the violation of his constitutional rights. Secondly is the interest in deterring officials from undertaking actions which violate the constitutional rights of citizens.

And in Butz the Court stressed that the higher an executive official is, the greater his power and the greater his capacity to inflict harm, and therefore the need for deterrence is correspondingly great. We submit that under that analysis that the deterring interest is at its peak when you're dealing with the President, because he of course is the chief executive officer with the greatest degree of wherewithal to inflict harm on people.

And third, and most fundamentally, the principle that in this country no man is above the law, and all executive officers should have to face suit if in fact they clearly have engaged in a violation of constitutional rights.

QUESTION: But you seem to concede that judges are

above the law.

MR. LYNCH: Yes, Your Honor. Well, they're not above the law. They're in an area -- yes, they have absolute immunity. I don't want to quibble about that.

But the policy justification for that is much different. As the Court said in Butz, the cluster of immunities that attach to participants in the judicial process arises from the nature of the judicial process. It's open, it's adversarial, and above all, errors are generally correctable on appeal. And therefore the balance has been struck in favor of absolute immunity.

When you're dealing with the executive branch, frequently the actions are not open, and when you're dealing with violations of constitutional rights, there is no appeal. As Mr. Justice Harlan said in Bivens, for people in the Halperin shoes, it's damages or nothing.

Against these interests, the Government identifies a number of countervailing interests which in our view are not sufficient to alter the balance that was struck.

QUESTION: Number one, you couldn't go publicly out in a courtroom or anyplace publicly and ask for permission to tap somebody's phone. That wouldn't be very helpful, would it?

MR. LYNCH: Of course not. That's a big problem.

QUESTION: Case number one, which makes it a little different.

QUESTION: And could you hold your meetings in public if you were trying to decide whether you were going to take some particular military action or diplomatic sanction against another country?

MR. LYNCH: No, generally that has to be conducted privately.

QUESTION: So that, while all of our proceedings and all other judicial proceedings can be conducted in the open, you concede that all the executive functions cannot be in the open?

MR. LYNCH: That's right. And that's one of the distinctions between executive and judicial proceedings that argues against absolute immunity for executive officers.

QUESTION: does it not also argue equally for?

MR. LYNCH: Well, I think if you're worried about the disclosure of state secrets, for example, that privilege is absolute, and if a damage claimant runs into a properly claimed state secret privilege assertion, he may well lose the suit. The suit will be dismissed. In fact, there's a case in the District of Columbia Court of Appeals, Halkin v. Helms, 598 F.2d 1, where that precise result obtained, and I was involved in it and unhappily lost. We couldn't overcome the state secrets privilege. So those interests will be protected, Mr. Chief Justice.

The principal countervailing interest which

the government identifies to argue against the qualified immunity, is the inhibition on the President's time that defending such suits will occasion. Bearing in mind -- and it has to be borne foremost in mind, the President enjoys the greatest degree of protection of any official under the qualified immunity doctrine. The qualified immunity doctrine, as was spelled out in Scheuer v. Rhodes, which in fact involved the chief executive officer of a state -- which while not obviously on all fours is similar to the situation -- very clearly spelled out the principles that the greater an official's responsibilities, the wider the scope of his discretion, the greater the exigencies under which he must make decisions, the greater his opportunity to prevail under qualified immunity will be. And for that reason we think that the President is likely to escape suits in all situations except where it is shown that he is directly and personally involved on a continuing basis in the violation of constitutional rights, such as is demonstrated in this case.

QUESTION: What areas of the function of a governor must be conducted with great secrecy and privacy as compared with a President or the Secretary of State, and Secretary of Defense, for example.

MR. LYNCH: Well, for example, the government of Governor Rhodes in Scheuer was dealing with an insurrection at Kent State University, and he had to decide how to deploy

the National Guard.

QUESTION: That was a question, whether he was dealing with an insurrection, was it not?

MR. LYNCH: Well, it was -- it was a very violent and turbulent situation. Whether it could be legally defined as an insurrection, I may have overspoke on that.

QUESTION: Do you consider that comparable to dealing with some of our active adversaries in the world?

MR. LYNCH: No, I think the President, because the President's responsibility in dealing in foreign policy is even more complex, more difficult to put your finger on the optimum right course, as Judge Leventhal called it, the President's immunity is very great at that level. And gets to the point, where as I was speaking with Mr. Justice Stevens, it was probably alive with absolute immunity, as a practical matter.

QUESTION: Mr. Lynch, let's think about World War II. Assume that President Roosevelt had reason to believe that one of his personal staff members who was conscientiously opposed to any war was leaking information with respect to military operations. Would the President's efforts to locate or identify that individual be political, as I think your argument suggests, or would they be in connection with national security and foreign policy?

MR. LYNCH: If it was -- if the effort was solely to

identify the source of the leak during World War II, I would say that's a national security foreign policy problem. But if the wiretaps continued for 21 months and no information, no evidence of leaking had come in, then you'd begin to suspect that the purpose had shifted.

QUESTION: So the purpose could shift, even though it started out quite properly, could it?

MR. LYNCH: That's entirely possible. And the theory of our case depends very heavily, as the Court of Appeals recognized, on the various time sequences over this 21-month period. It may be in fact very difficult for us to recover for the first week. The petitioners may be able to make a very strong good faith showing at that point. But when you get out to the end of the 21 months, we think we should have a much easier time to recover, assuming we get over this absolute immunity hurdle.

One of the other interests that the Government has identified as militating in favor of an absolute immunity is the artfulness, or the danger of artful pleading, and the fact that the President will be ensnared in insubstantial lawsuits. Again, this is, the empirical evidence does not support this argument. and in this case we have very solid evidence to support our claims, and I think it's worth noting that Judge Gesell in his concurrence proposed a higher standard for a plaintiff's overcoming summary judgment, while he

advocated that higher standard he certainly didn't suggest that we hadn't met it in this case.

The courts in our view have such, the district courts have such great discretion in the timing and scheduling of suits that they can use their ingenuity and the flexibility that's vested in them under the Federal Rules to make accommodations for the President's time, so that if you get one of these situations where the President is deeply involved in a clear violation of constitutional rights and it is necessary to procure this evidence, that can be done with a minimum of imposition on his time.

If contrary to our submission the Court decides that absolute immunity is appropriate for the President, we of course urge the Court to reject the contention that the petitioners Kissinger, Mitchell, and Haldeman enjoyed derivative immunity. If the Court were to accept this doctrine it would substantially erode the system of deterrence that the Court has sought to foster in Butz. In other words, if the President is free to violate constitutional rights with impunity, it's essential and absolutely important that his associates be constrained from doing so.

I think, unless the Court has further questions, I don't have anything further I need to say.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. the case is submitted.

(Whereupon, at 2:51 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-880

HENRY KISSINGER, ET AL.

V.

MORTON HALPERIN, ET AL.

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: William J. Wilson