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Telephone: (202) 554-2345

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 RICHARD NIXON, :

4 Petitioner :

5 v. : No. 79-1738

6 A. ERNEST FITZGERALD; and :

7 BRYCE N. HARLOW and ALEXANDER P. BUTTERFIELD, :

8 Petitioners :

9 v. : No. 80-945

10 A. ERNEST FITZGERALD :

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12 Washington, D.C.

13 Monday, November 30, 1981

14 The above-entitled matter came on for oral argu-
15 ment before the Supreme Court of the United States at
16 10:00 o'clock a.m.

17 APPEARANCES:

18 HERBERT J. MILLER, JR., ESQ., Suite 500,
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 on behalf of the Petitioner (Nixon).

20 ELLIOT L. RICHARDSON, ESQ., 1747 Pennsylvania
21 Avenue, N.W., Washington, D.C. 20006; on
 behalf of the Petitioners Harlow and Butterfield.

22 JOHN E. NOLAN, JR., ESQ., 1250 Connecticut
23 Avenue, N.W., Washington, D.C. 20036; on
 behalf of Respondent.

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C O N T E N T S

2 ORAL ARGUMENT OF

PAGE

3 HERBERT J. MILLER, JR., ESQ.,
on behalf of Petitioner Nixon

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5 ELLIOT L. RICHARDSON, ESQ.,
on behalf of Petitioners Harlow and Butterfield

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6 JOHN E. NOLAN, JR., ESQ.,
on behalf of Respondent

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in 79-1738, Nixon against Fitzgerald and the related case, 80-945, Harlow and Butterfield against Fitzgerald. Mr. Miller, you may proceed whenever you are ready.

In your own time, Mr. Miller, I hope you will address the question of whether this case possibly presents a matter of seeking an advisory opinion of the Court. But do it in your own time.

ORAL ARGUMENT OF HERBERT J. MILLER, JR., ESQ.
ON BEHALF OF PETITIONER NIXON

MR. MILLER: Mr. Chief Justice, and may it please the Court, the issue here in this case deals with the question of what privilege the President of the United States may have when sued for damages by a private individual for a constitutional violation, alleged, or a violation of a statutorily inferred cause of action.

Just briefly if I may, let me address the facts. The case started in November of 1968, over 13 years ago, when one Fitzgerald, a cost accountant for the Air Force, testified before Senator Proxmire's committee, and testified that there were substantial cost overruns on the C5-A transport plane project.

This testimony, as Mr. Fitzgerald has alleged,

1 engendered a substantial impact in terms of his job during
2 the Johnson Administration. He was told by Secretary Brown
3 at the time that he had not been a good witness, and has
4 alleged that actions were taken to make his employment less
5 inviting.

6 Subsequently, President Nixon was sworn in in
7 January, and President Nixon's Secretary of the Air Force,
8 Mr. Seamans, took over in February of 1969. During the
9 course of Mr. Seamans' administration, it was decided and,
10 in fact, in November there was signed a reorganization
11 order, which was an attempt to reorganize the Air Force to
12 make it more cost efficient. As a part of that
13 reorganization order, there were a substantial number of Air
14 Force employees who were reduced in force, one of whom was
15 Mr. Fitzgerald.

16 The case itself had engendered publicity at the
17 time, particularly when it became public knowledge in
18 November of 1969 that Mr. Fitzgerald was going to be reduced
19 in force.

20 On December 8 of 1969, President Nixon was
21 preparing for a press conference. In the course of the
22 preparations for that press conference, he was advised by
23 aides of a conflict within his administration over the
24 question of whether Mr. Fitzgerald should be offered another
25 job. The Defense Department was violently opposed, and

1 others in the administration thought he should be given
2 another job. The question was asked at the press
3 conference; Mr. President Nixon said he would look into the
4 matter.

5 Subsequently, President Nixon did, in fact, look
6 into the matter and suggested that Mr. Fitzgerald be given a
7 job with the Bureau of the Budget and indeed, asked Mr.
8 Haldeman, one of his aides, to take steps to see that Mr.
9 Fitzgerald was given another job in government.

10 In 1970, Mr. Fitzgerald left office as an employee
11 and commenced a Civil Service proceeding seeking
12 reinstatement. There, the matter rested for some three
13 years. The Civil Service proceeding continued, and on
14 January 30 of 1973, Secretary Seamans, Secretary of the Air
15 Force, testified at the Civil Service proceeding; testified
16 at length. He testified, among other things, that he
17 received absolutely no direction from the White House with
18 respect to the discharge or removal of Mr. Fitzgerald from
19 the federal service.

20 He did, on the other hand, invoke executive
21 privilege as to the question of whether or not -- and what
22 was actually said with respect to his conversation with
23 White House personnel.

24 The following day, on January 31, 1973, President
25 Nixon was blind-sided in the course of a press conference by

1 a question from Clark Mollenhoff, who had left the
2 government, and was now back as a private reporter.

3 QUESTION: Is that a term of art?

4 MR. MILLER: That is a term of art, Mr. Justice
5 White. The question was unexpected and he was unprepared.

6 In the course of his press conference in answering
7 the question, he answered a question about executive
8 privilege of Mr. Seaman, and further said, "I was
9 responsible for the Fitzgerald firing, I did it, I take
10 responsibility." Or words to that effect.

11 QUESTION: By the way, was the question Mr.
12 Mollenhoff put related in any way to the duties he had
13 formerly performed on the White House staff?

14 MR. MILLER: Yes, sir, because Mr. Mollenhoff had
15 earlier, back in 1969, conducted an investigation into the
16 Fitzgerald matter and had tried to find out what the facts
17 were with respect to the position of the Air Force with
18 respect to Mr. Fitzgerald.

19 Mr. Mollenhoff had also made his views known on
20 many occasions concerning his belief as to the issuance of
21 -- or taking executive privilege by people in the White
22 House or people in the Executive Branch. He was
23 substantially opposed to it.

24 Returning now to January 31 of 1973, after the
25 press conference we have two tape recordings which are of

1 interest here. First, at 4:17 in the afternoon of January
2 31, President Nixon is talking to his aide, Mr. Colson, and
3 this is one of the recorded conversations. In that
4 conversation, Nixon again says "Yes, I got rid of
5 Fitzgerald, I was the one who did it."

6 Thereafter, in approximately 20 minutes later at
7 4:32, President Nixon, again in a recorded conversation,
8 talks to Defendant Erlichman. All of a sudden, the
9 President realizes, and so states, "I am thinking of another
10 case, I am thinking of another guy."

11 Thereafter, having realized that it was not
12 Fitzgerald that he had been talking to, that he had made a
13 mistake in the press conference, he talked to Mr. Ziegler,
14 his press secretary, and the following day, on February 1,
15 Mr. Ziegler issued a statement that President Nixon was
16 mistaken in his reference to Mr. Fitzgerald. This was at a
17 press conference called at which the President was not
18 present, but only the press secretary.

19 Thereafter, the Civil Service Commission found
20 that Mr. Fitzgerald had been reduced in force improperly
21 because it had been done for reasons personal to him. And
22 he was ordered reinstated with back pay.

23 Subsequently, on July of 1974, Mr. Fitzgerald
24 filed a lawsuit naming Secretary Seamans and several of the
25 people at the Department of the Air Force for damages,

1 claiming he was improperly discharged and alleging a
2 conspiracy. This case eventually was dismissed on the
3 statute of limitations ground, affirmed by the Court of
4 Appeals, with the exception of the one White House
5 individual, Mr. Butterfield. Mr. Butterfield, the court
6 held that Mr. Fitzgerald could not have known of Mr.
7 Butterfield's involvement, and therefore, the statute of
8 limitations had not run against him.

9 Then in July 1978, some ten years after the
10 initial testimony by Mr. Fitzgerald, Mr. Fitzgerald sued the
11 ex-President of the United States, Mr. Nixon, Mr. Harlow
12 and, of course, Mr. Butterfield was a defendant. He alleged
13 several violations including violation of the First
14 Amendment and the two statutorily-inferred causes of action
15 which continue until before this Court, which is a violation
16 of 18 USC Section 1505, the obstruction statute, and 5 USC
17 Section 7211, guaranteeing employees the right to contact
18 Congress.

19 The court below, after extended discovery
20 involving depositions in California, depositions of many of
21 the former members of the Nixon Administration, finally
22 determined that the statute of limitations defense was
23 inapplicable, and that the defense of absolute privilege was
24 unavailable to either President Nixon or to his aides. This
25 appeal followed.

1 I have gone into the facts in some detail, if the
2 Court please, to try to show how the chief magistrate of
3 this country can become involved in a matter which, on a
4 scale, is not very important from a national standpoint,
5 compared to the other decisions that a president must make,
6 and that over a five and a half year period he may have
7 devoted some 20 or 30 minutes of his time to it, and now
8 finds that he is charged with a constitutional and statutory
9 violation. There has been substantial discovery going into
10 his motivations, the motivations of his aides, and that he
11 still would, except for an agreement to limit liability,
12 would be facing a month's trial.

13 As to the agreement on the limitation of
14 liability, if the Court please, this was done, entered into,
15 for the following reasons. First, the President of the
16 United States as President of the United States achieves a
17 status unlike any other litigant. By reason of the many
18 decisions that he has to make while in office, he incurs
19 enmities, he incurs enemies and he, many times, is looked
20 upon with great disfavor.

21 As a practical matter, representing a former
22 president who has not been treated with great respect by the
23 press, to put it mildly, is a very difficult problem for a
24 lawyer because of the practical situation of taking a case
25 where that man is a defendant before a jury in any

1 jurisdiction in the United States. It is a very, very
2 difficult problem and it is one of the real reasons behind
3 why absolute privilege is a requirement when we are talking
4 about constitutionally-based suits against presidents or
5 former presidents.

6 They go in, I don't care how popular the president
7 may have been, but during the course of his administration,
8 decisions are made, he does things which are not looked on
9 with favor by some portion of the public, and he is in a
10 very difficult position when it comes to actually going
11 before a jury of his peers in a civil lawsuit.

12 QUESTION: Mr. Miller, before you get to that,
13 won't you address -- I see your time is running -- the
14 question the Chief Justice put to you? As I understand it,
15 Mr. Nixon has paid Fitzgerald at least \$100,000 and has,
16 what, a conditional liability for another \$42?

17 MR. MILLER: That has been paid, sir.

18 QUESTION: And that has been paid also. And no
19 matter what the outcome of this suit may be, Fitzgerald
20 keeps that.

21 MR. MILLER: That is correct.

22 QUESTION: Then what are we addressing here anyway?

23 MR. MILLER: Because, if the Court please, there
24 is an additional payment, a third payment, which is required
25 by the agreement. And that is in the amount of \$28,000.

1 If, indeed, President Nixon loses in this particular case
2 and the case is remanded to the district court, then he is
3 required to pay Fitzgerald an additional \$28,000.

4 If, in fact, the case is remanded to the district
5 court and there is a decision by the district court based on
6 the record as it now stands, President Nixon does not have
7 to pay the additional \$28,000.

8 QUESTION: But to the extent of \$142,000, he has
9 conceded liability, hasn't he?

10 MR. MILLER: Oh, if the Court please, certainly
11 not. This was a means recommended by counsel --

12 QUESTION: Fitzgerald keeps the \$142,000, doesn't
13 he?

14 MR. MILLER: Yes, sir. But it is by no means, it
15 is by no means any intimation that he is, shall we say,
16 guilty of the allegations in the complaint. To the
17 contrary. He has steadfastly maintained and provided an
18 agreement that the sole reason for making this payment was
19 to avoid a month-long trial, the amount of --

20 QUESTION: What about the old adage that actions
21 speak louder than words?

22 MR. MILLER: That does not apply here, if the
23 Court please, because both counsel for Fitzgerald, Mr.
24 Barrett Prettyman at the time, and counsel for President
25 Nixon felt that this issue should continue, and the

1 agreement was drafted so that he is not -- it is merely a
2 limitation of liability. It does not moot out the case
3 because there are additional sums that have to be --

4 QUESTION: Well, that sounds to me like a feigned
5 issue. That counsel have agreed to feign an issue to get us
6 to decide a question that, as the Chief earlier -- a
7 question earlier suggested, might be only an advisory
8 opinion. And we certainly can't render advisory opinions,
9 can we?

10 MR. MILLER: Of course not. And you would not be
11 in this case, if the Court please. This is not -- I don't
12 think that the payment of \$28,000 is a feigned issue, if the
13 court please.

14 QUESTION: As compared to \$148,000.

15 MR. MILLER: Even as compared to \$142,000.

16 QUESTION: Well, if you win, then he made a
17 mistake in paying the \$142,000, didn't he?

18 MR. MILLER: On the contrary. President Nixon has
19 not had to pay --

20 QUESTION: Oh, he's just generous.

21 MR. MILLER: No, sir. Because we have not had to
22 make -- he has not had to pay counsel and the costs of
23 preparing for the trial and going through the trial.
24 Looking at the amount involved, it was a very close estimate
25 as to what it was going to cost to get this case to trial

1 and through trial.

2 So under no circumstances would I concede that
3 this is a feigned issue or that the payment of some money
4 is, indeed, any --

5 QUESTION: When was this agreement reached, Mr.
6 Miller?

7 MR. MILLER: This agreement was signed on the
8 morning of May 19th, at approximately 3:00 a.m.

9 QUESTION: That was Monday morning?

10 MR. MILLER: That was Monday morning.

11 QUESTION: On the order list of -- at 10:00
12 appeared our ode of this case, was it?

13 MR. MILLER: Yes -- well, appeared the grant of
14 the certiorari in the Halperin case, and the holding of this
15 case to a subsequent date, the Fitzgerald case to a
16 subsequent date. So that the agreement was signed before
17 the Halperin decision was announced, and before certiorari
18 was granted in this case, which was much later.

19 QUESTION: Mr. Miller, this was 1980, wasn't it?
20 You said May 19th. I want to get the year down.

21 MR. MILLER: I'm sorry. Yes, it was May 19,
22 1980. Yes.

23 QUESTION: And when was this Court advised of the
24 entry of that agreement?

25 MR. MILLER: On June 10, 1980, approximately 20

1 days later. There was filed with the Court a joint
2 statement by Mr. Prettyman and Mr. Mortenson, and that has
3 been in the record of this Court since that date, and that
4 was well in advance of any grant of certiorari by the
5 Fitzgerald --

6 QUESTION: Does that joint statement recite the
7 details you have told us this morning?

8 MR. MILLER: Yes, sir.

9 QUESTION: Mr. Miller, may I inquire, so that I
10 really understand what you are saying, in the event that
11 this Court were to somehow resolve this case in a manner
12 which required the lower court to adjudicate any further
13 facts, it would trigger the payment of an additional
14 \$28,000, but in fact there would be no further
15 adjudication. Is that right?

16 MR. MILLER: Yes. If the court, if the district
17 court enters an order based on the current record after
18 remand from this Court, and that ends the matter, then we do
19 not owe the additional \$28,000.

20 QUESTION: That isn't too clear to me. Suppose
21 this Court were to rule in the case on the merits as they
22 have been raised in the petition, and to hold against your
23 client, and therefore the matter is returned to the district
24 court eventually. Would that then trigger the payment of
25 the \$28,000, and there would in fact be no further

1 proceedings?

2 MR. MILLER: Yes. If we lose --

3 QUESTION: So no matter what happens, there will
4 be no further adjudication of the facts.

5 MR. MILLER: That is -- that is correct.

6 QUESTION: No matter how we rule.

7 MR. MILLER: Yes.

8 QUESTION: Thank you.

9 CHIEF JUSTICE BURGER: Mr. Richardson?

10 ORAL ARGUMENT OF ELLIOT L. RICHARDSON, ESQ.,

11 ON BEHALF OF PETITIONERS HARLOW AND BUTTERFIELD

12 MR. RICHARDSON: Mr. Chief Justice, and may it
13 please the Court, in the case of Petitioners Harlow and
14 Butterfield, a denial of immunity would require them to
15 endure a protracted and expensive trial of their
16 reasonableness and good faith in a matter which at most they
17 touched only tangentially.

18 The central issue therefore is whether senior
19 advisors to the President of the United States should be
20 required as a matter of basic public policy to endure a
21 trial in such circumstances. I respectfully submit that on
22 these facts, the answer should be no. To require the trial
23 of allegations of complicity in a constitutional tort as
24 thin and remote as those asserted against Harlow and
25 Butterfield would be to stretch completely out of shape the

1 already slack criteria for inferring a private cause of
2 action from a constitutionally protected right.

3 QUESTION: Mr. Richardson, was Mr. Butterfield
4 working at the White House during all of the relevant period
5 of time?

6 MR. RICHARDSON: Yes, he was, Justice Rehnquist.
7 He worked there during all of the periods at least in which
8 he is alleged to have had in any way even the remotest
9 contact with the situation.

10 QUESTION: Mr. Richardson, there is no settlement
11 agreement for your clients. Is that correct?

12 MR. RICHARDSON: That is correct, Justice
13 O'Connor. There is none.

14 QUESTION: Doesn't your statement suggest, Mr.
15 Richardson, perhaps not in this case, but that there may be
16 other cases in which the Butterfields and Harlows would not
17 have a privilege? Not have immunity, really?

18 MR. RICHARDSON: Yes, Your Honor. As I shall try
19 to demonstrate at a later point, we think that at least one
20 possible way of limiting the necessity for trials in cases
21 such as this would be, first of all, to make unmistakably
22 clear that the burden of persuasion as to the absence of
23 reasonableness and the existence of malice should rest upon
24 the plaintiff, and secondly, that the evidence on these
25 points should be established in accordance with a stricter

1 standard than preponderance, a standard such, for example,
2 as clear and convincing evidence.

3 It is clear in any case, and indeed undisputed,
4 that the Petitioners Harlow and Butterfield had no part in
5 abolishing Fitzgerald's job. Harlow's contact with the
6 matter arose from his responsibility for handling
7 Congressional relations for the White House. The only
8 significant elements of contact with the matter on his part
9 consisted of four conversations with Air Force Secretary
10 Robert Seamens.

11 The first two of these conversations occurred in
12 May, 1969, and even after exhaustive discovery proceedings,
13 all we know about Harlow's part in these conversations is
14 that he warned against the proposed timing of the Air Force
15 reorganization plan because it might cause adverse
16 Congressional repercussions.

17 The second pair of conversations between Harlow
18 and Secretary Seamens took place in November and December of
19 1969, after the reorganization plan had already been carried
20 out. The depositions on the part of all those who knew
21 anything about the situation, tell us merely that Harlow was
22 non-committal in both conversations. That is all the
23 evidence as to Petitioner Harlow, virtually all, except for
24 the tape recordings to which my brother counsel, Mr. Miller,
25 has already referred.

1 QUESTION: How are these facts relevant, Mr.
2 Richardson, to the question of whether your clients should
3 have absolute liability?

4 MR. RICHARDSON: They are relevant, Mr. Chief
5 Justice, for the reason that they are the only facts that
6 connect them with the case at all and which have thus far
7 already dragged them into the position of being defendants.
8 So --

9 QUESTION: Well, if you have absolute liability,
10 the facts are irrelevant. Wouldn't you agree?

11 MR. RICHARDSON: Yes, they would be irrelevant
12 entirely in that case.

13 QUESTION: But, Mr. Richardson, I didn't
14 understand your opening statement as arguing that your
15 clients at least enjoyed absolute immunity. I thought from
16 what you said it was only qualified immunity. Am I wrong?

17 MR. RICHARDSON: No, Your Honor. I said that the
18 question of the avoidance of trial in this case does present
19 the issues of proof, the burden of proof, and the standard
20 of proof to which I have already referred, but our initial
21 position is that they should be entitled to absolute
22 immunity on the basis essentially that a Congressional aide
23 benefits from the immunity under the speech and debate
24 clause, as this Court held in the Gravel case. We argue
25 that if the President is to be absolutely immune for the

1 reasons already ably argued by Nixon's counsel, then it
2 should follow for the Gravel reasons that so should senior
3 advisors upon whom he must necessarily depend in order to
4 carry out the widely ramified and enormously demanding
5 responsibilities of his office.

6 QUESTION: Is this in any way connected with
7 whether their conduct is within or without the scope of
8 their authority, or do they have an absolute immunity in
9 your submission, even if what they do is outside any
10 authority that they have been given as aides to the
11 President?

12 MR. RICHARDSON: We would recognize that their
13 actions must be within the outer perimeter of their
14 authority within the terms of the language in this Court's
15 decision in Barr against Matteo. We would argue that --

16 QUESTION: That would be true also under the
17 Gravel case, would it not?

18 MR. RICHARDSON: Yes, it would be true, we
19 believe, with respect to any assertion of immunity, absolute
20 or qualified, that the actions must be within the general
21 scope of the authority of the public official in question.

22 QUESTION: I thought Barr against Matteo was
23 limited to scope.

24 MR. RICHARDSON: Barr against Matteo dealt
25 extensively with scope, Your Honor.

1 QUESTION: I thought that was all that was
2 involved in it.

3 MR. RICHARDSON: Except for the holding that
4 absolute immunity was available in the case of a common law
5 tort.

6 QUESTION: But there were no outer limits involved
7 in that. This was then the work that he was doing.

8 MR. RICHARDSON: Yes. And so here, the only
9 connection between Harlow and this matter arose out of his
10 responsibilities in Congressional relations and the concern
11 of the Secretary of the Air Force that there would be
12 Congressional repercussions if the reorganization plan went
13 forward. In Butterfield's case, his connection with it
14 arose out of the fact that he was deputy to the chief of
15 staff of the President, and the secretary of the cabinet.
16 So that in each case --

17 QUESTION: Mr. Richardson, do you think that the
18 so-called higher standard of proof or putting the burden on
19 the plaintiff rather than the defendant when the issue is
20 state of mind would actually avoid many trials? Do you
21 think any summary judgments could be granted with confidence
22 in cases where your standards were adopted, that couldn't
23 likewise be granted where the burden of proof remained as it
24 is and the burden of persuasion as it is?

25 MR. RICHARDSON: I think, Justice Rehnquist, that

1 if this Court were in effect to re-enforce the policy
2 reflected in its plurality opinion in Butz against Economou,
3 that it could significantly reduce the number of cases that
4 would have to go to trial and increase the number in which a
5 motion for summary judgment was granted.

6 The Court expressed great optimism in Butz against
7 Economou that insubstantial causes of action, cases in which
8 there had been the exercise of loyalty, ingenuity, and
9 finding a constitutional tort could be eliminated. Now,
10 this Court can either find in situations like this that
11 absolute immunity should be granted, which of course was the
12 position of those who dissented in part in that case, or it
13 can -- it can partially reach, partially remedy the
14 undesirable byproducts of Butz against Economou by making it
15 harder to get to court.

16 It would have to issue what amounted to a very
17 clearcut kind of directive to the lower courts to look very
18 hard at the allegations alleged to establish
19 unreasonableness with respect to the awareness of the actor
20 that what he did could affect someone else's constitutional
21 rights, and it would have to enjoin upon the lower courts
22 close scrutiny of allegations of malice, applying the two
23 standards of Wood against Strickland.

24 QUESTION: What if the malice end of it or the bad
25 faith of it was wholly eliminated, and you had only an

1 objective test of the immunity, whether a reasonable person
2 should have realized that his action was unlawful?

3 MR. RICHARDSON: That would be a way of partially
4 narrowing the number of cases required to be submitted to
5 trial, and the objective determination of reasonableness
6 would on the face of it be easier to make on the record.

7 QUESTION: But it would -- it wouldn't eliminate
8 certainly some preliminary proceedings, but on summary
9 judgment it would be a little different matter --

10 MR. RICHARDSON: Yes.

11 QUESTION: -- than if the malice part were still
12 in the case.

13 MR. RICHARDSON: Yes. To that extent it would be
14 a contraction of the very wide ramifications of the
15 combination of Butz against Economou on the one side and
16 Bivens on the other, the combination of which has been to
17 generate over 2,000 Bivens type cases now pending, of which
18 to date only nine have resulted in the award of damages.
19 The result has been the generation of an enormous volume of
20 litigation with dubious public policy benefit.

21 QUESTION: Mr. Richardson, if as you suggest
22 absolute immunity for aides is limited to conduct within
23 their authority, although perhaps I should have asked this
24 of Mr. Miller, would you make the same observation as to the
25 absolute immunity claim by the President?

1 MR. RICHARDSON: Oh, yes, I think so.

2 QUESTION: If he acted outside the scope of his
3 authority.

4 MR. RICHARDSON: I am sure it would not be
5 conceded that he did in this --

6 QUESTION: No, but if it were discovered that he
7 did.

8 MR. RICHARDSON: If he did, yes.

9 QUESTION: He would not enjoy absolute immunity.

10 MR. RICHARDSON: I think that should follow. Yes,
11 sir. Well, now, I have already touched on the --

12 QUESTION: Mr. Richardson, may I ask you a
13 question? At the end of your brief, you have a reference to
14 the appropriate standard of proof on this issue of qualified
15 immunity, which you apparently aren't prepared to identify
16 in your own brief, and I have some difficulty in this
17 particular case understanding your argument, because it
18 seems to me the question at the bottom of the case is
19 whether the Air Force was reorganized in order to eliminate
20 this job and get rid of the plaintiff. That is kind of the
21 basic factual issue as I understand it.

22 Now, isn't that going to remain the issue no
23 matter what we talk about, whether it is qualified immunity
24 or liability or what?

25 MR. RICHARDSON: I would respectfully suggest not,

1 Mr. Justice Stevens. The question in the first instance is
2 whether in the case of our Petitioners they had anything to
3 do with the Air Force action at all, and we think that the
4 thinness of their connection with the Air Force action is
5 part of the basis on which the motion for summary judgment
6 should have been denied or should have been denied at least
7 if an appropriate proof requirement were --

8 QUESTION: But if their connection is so thin, it
9 seems to me that is a defense on the liability as well as a
10 defense under your qualified immunity.

11 MR. RICHARDSON: It would be if the case had to go
12 to trial. Clearly, yes.

13 QUESTION: You are saying as a matter of law their
14 connection with this transaction is so thin that there is no
15 liability.

16 MR. RICHARDSON: Yes. We are saying that the --

17 QUESTION: So it is much like --

18 MR. RICHARDSON: -- motion for summary judgment
19 should as a matter of law have been denied, and while we
20 can't quarrel necessarily with the basis on which it was
21 denied by the lower court, that nevertheless this Court
22 could and should raise the standards for determining when
23 such a motion should be granted or denied, as the case may
24 be. But we would argue, apart from this point, which I do
25 think is central to the question of the administration of

1 justice in this context, that these Petitioners are also
2 entitled to absolute immunity apart from deriving it from
3 the President of the United States, to the extent that they
4 perform the kind of special functions recognized in Butz
5 against Economou.

6 It would be hard to think of an example of special
7 functions that the Court could have had in view that is more
8 demanding of immunity than that of senior advisors to the
9 President of the United States. The Court has, of course,
10 recognized partly for historic reasons the immunity of
11 judges, the immunity of prosecutors. It has extended that
12 to recognition of the absolute immunity of special
13 assistants to the Attorney General, agent attorneys in the
14 Department of Agriculture, while denying absolute immunity
15 to the heads of the Departments of Justice and Agriculture.

16 QUESTION: Except that that wasn't a blanket
17 denial. It was, I suppose, if they were performing the kind
18 of function for which absolute immunity is recognized, they
19 would have it for that function, too.

20 MR. RICHARDSON: Yes, and I am not suggesting that
21 the Court wrongly denied absolute immunity to judges and
22 prosecutors, but I am suggesting that the policy
23 considerations that justify absolute immunity for judges and
24 prosecutors surely must apply to people who deal with an
25 enormous volume of problems day in and day out with unknown

1 possible ramifications as they may affect private
2 individuals.

3 QUESTION: Well, now, is this present argument
4 that the special functions argument is the predicate for
5 that, that the President is absolutely immune? Suppose it
6 was held that the President was not? Then where does your
7 special functions argument go?

8 MR. RICHARDSON: I think it is arguable that the
9 President's senior advisors may have absolute immunity even
10 if he doesn't. Insofar as the policy argument rests on a
11 concern that the officeholder will act timidly or
12 indecisively in dealing with matters coming before him, the
13 President of the United States, I suppose, might be
14 considered to be beyond worry about eventual lawsuits, but
15 where the problem is that of recruiting good people to
16 assume responsibilities in sensitive positions, whether in
17 the White House or indeed other Executive Branch positions,
18 the worry about lawsuits can deter their willingness to take
19 these jobs, or can paralyze their performance of them.

20 QUESTION: Mr. Richardson, are you going to argue
21 or leave to your brief the question of whether there is any
22 cause of action in this case at all?

23 MR. RICHARDSON: Yes, Justice White. We do raise
24 that question. We acknowledge that it was not among the
25 questions presented in our petition. We point out --

1 QUESTION: It is semi-jurisdictional, anyway.

2 MR. RICHARDSON: Semi, I suppose, but the Court
3 has in the past dealt with questions other than those
4 specifically identified. We cite a case, Procunier against
5 Navarette, in which the obverse situation was presented.
6 There, the issue identified was whether there was a cause of
7 action, but the Court said the question of qualified
8 immunity is subsumed by that question. Here, the question
9 of whether there is any cause of action at all is intimately
10 related to the fact that we have here an employer-employee
11 relationship which has significance both for the issue of
12 immunity and for the issue of the cause of action.

13 QUESTION: Your argument on the merits of that
14 issue, though, is what, Mr. Richardson?

15 MR. RICHARDSON: Our argument on the merits of
16 that issue is drawn from a decision of the Fifth Circuit in
17 a case called Bush against Lucas, where the court having
18 fully in view the earlier decisions of this Court,
19 particularly Carlson against Green, nevertheless said that
20 the relationship of employer and employee is distinguishable
21 from the relationship of the government as sovereign to the
22 private citizen, and that where, then, the Congress has
23 regulated that relationship through provision for such a
24 remedy as reinstatement and back pay, then the result should
25 be the denial of a Bivens type action, that

1 there is no need for inferring a constitutional tort in such
2 a case, because there is otherwise an adequate remedy in
3 that special relationship, and there the court relied on the
4 reference, the sort of escape hatch there that had been
5 identified in this line of cases which refers to special
6 factors counseling hesitation for the inferring of a Bivens
7 suit.

8 QUESTION: Mr. Richardson, do you think we must
9 reach the private cause of action issues before we address
10 the immunity issue?

11 MR. RICHARDSON: I don't believe, Justice Powell,
12 I could argue that you must do so, except perhaps in a
13 strictly analytical sense. From the standpoint of the
14 responsibility of the Court toward issues addressed to it, I
15 have no doubt that you could skip over the issue and go on
16 to the absolute immunity.

17 QUESTION: Is your case here on the collateral
18 doctrine, collateral order doctrine?

19 MR. RICHARDSON: Yes, it is.

20 QUESTION: So perhaps we could reach the immunity
21 issue without considering the cause of action issue, perhaps.

22 MR. RICHARDSON: Yes, I believe you could do so.

23 QUESTION: But your submission is, it would be
24 preferable to reach the cause of action issues?

25 MR. RICHARDSON: Yes, that is correct.

1 QUESTION: Well, do you understand that the -- is
2 your claim of absolute immunity constitutionally based? Is
3 it based in the separation of powers, for example?

4 MR. RICHARDSON: We think that consideration of
5 the separations of powers at least reinforces our claim of
6 absolute immunity insofar as the denial of it necessitates
7 inquiry into the internal processes of the Executive
8 Branch --

9 QUESTION: Your submission, then, I take it, would
10 be that even if Congress passed a law purporting to say when
11 the President would be liable or when he wouldn't, that that
12 law would be unconstitutional? Is that part of your
13 absolute immunity argument?

14 MR. RICHARDSON: I don't think we had thought of
15 pressing it quite so far. We had only gone to the point of
16 arguing that from a policy standpoint, it needs to be
17 recognized that the denial of absolute immunity injects a
18 trial court, the judicial branch into the internal
19 deliberations of the White House.

20 QUESTION: Well, to the extent that your argument
21 is constitutionally based, the cause of action issue, if it
22 were decided that there was no cause of action, would avoid
23 a constitutional decision.

24 MR. RICHARDSON: Yes, that would avoid -- of
25 course, it would avoid all the subsequent issues, to rule

1 that it is not legitimate in a personnel action of this kind
2 where the plaintiff has already received back pay and has
3 already been reinstated to his old job, that you should not
4 on top of that infer a Bivens action.

5 QUESTION: In other words, he has had all the
6 redress he is entitled to.

7 MR. RICHARDSON: Yes. Precisely. Thank you.
8 Thank you, Mr. Chief Justice.

9 CHIEF JUSTICE BURGER: Mr. Nolan?

10 ORAL ARGUMENT OF JOHN E. NOLAN, JR., ESQ.,

11 ON BEHALF OF THE RESPONDENT

12 MR. NOLAN: Mr. Chief Justice, and may it please
13 the Court, we recognize, of course, that the Court does not
14 have the obligation to weigh the evidence in this case, but
15 there are a couple of items on the facts that have come up
16 that I think that I should address, one particularly in
17 light of Justice Stevens' question.

18 The first one was Mr. Miller's statement, which
19 goes to the validity of the reorganization, that a
20 substantial number of Air Force employees were RIF'd, one of
21 whom was Fitzgerald. While that statement might be
22 technically true, the record, the joint appendix at Page 67A
23 reveals that of the 80 positions abolished in the Office of
24 the Secretary of the Air Force, Mr. Fitzgerald was the only
25 employee who was actually issued a RIF notice and was

1 actually separated by RIF.

2 Our point goes a little bit deeper, however. We
3 have characterized the reduction in force and the
4 reorganization in our brief as a sham. That is admittedly a
5 strong word, and the Court may be interested in why we would
6 make that characterization.

7 The irony of it is that approximately one year
8 before the reorganization was put into effect, a similar
9 reorganization, the same one, was proposed, but it would
10 have increased Mr. Fitzgerald's responsibilities rather than
11 eliminated his job. The only intervening event was his
12 testimony before the Senate Committee. In early 1969, on
13 January 6th, a few weeks after his testimony, a fellow named
14 Lang prepared a memorandum for the Secretary of the Air
15 Force, and in that memorandum he said, there are two things
16 you can do essentially if you want to get rid of
17 Fitzgerald. One is bring a proceeding against him for
18 cause, and the other one is reorganize his section and
19 abolish his job.

20 Mr. Hampton of the Civil Service Commission, the
21 Chairman of the Civil Service Commission, in May of 1969,
22 meeting with Secretary Seamens, said the same thing. If you
23 want to get rid of Fitzgerald, you are going to have to
24 abolish his job. The Civil Service Commission, in its
25 hearing examiner's finding on the Fitzgerald case, found

1 that the reorganization was inappropriate and a direct
2 violation of the Commission's statute and its regulations.

3 Mr. Nixon himself, speaking on the White House
4 tapes, gave the reason for the elimination of Fitzgerald.
5 He said, "It wasn't just that he was complaining about the
6 overruns, but rather that he was doing it publicly."

7 Secretary Laird, the Secretary of Defense,
8 testifying on the Hill, in the Congress, asked about the
9 Fitzgerald matter, said, yes, he was fired.

10 So, I think that for all of those reasons, it is
11 plain that the reorganization was not really a
12 reorganization insofar as it concerned Fitzgerald.

13 QUESTION: Are any of these facts, as I suggested
14 to your friends, relevant if there is absolute liability --
15 absolute immunity?

16 MR. NOLAN: I am moving toward a response to that
17 question, Mr. Chief Justice, but I would be glad to take it
18 up at this time.

19 QUESTION: Take it up in your own time.

20 MR. NOLAN: There is one other factual point that
21 I would like to address, and that deals with the attempted
22 retraction of Mr. Nixon's statement. The day after the
23 statement was made, his press secretary, Ron Ziegler, in a
24 meeting with the press, said that there is no record of this
25 matter ever having been presented to the President for a

1 decision.

2 Now, that was flatly, baldly, obviously
3 inaccurate, so apparently when he made that statement Mr.
4 Ziegler didn't know about the meeting in the oval office of
5 the White House at 4:17 and 4:32 p.m. of the preceding day.

6 Mr. Ziegler's second statement was that the
7 President misspoke himself. He intended to say not rather
8 than what he said. I think that one would just have to read
9 that in the record and make his own judgment about it.

10 Considerably later, approximatey six years later,
11 it has developed that President Nixon at the time may have
12 thought that he was referring to another government official
13 named Gordon Rule rather than Mr. Fitzgerald. And he so
14 testified in his deposition, although the depositions --
15 there were two of them, and they were taken admittedly a
16 long time later.

17 The problem with mixing Rule and Fitzgerald is
18 that the facts just don't fit. In the transcript of the
19 White House tapes --

20 QUESTION: Mr. Nolan, is this the least bit
21 relevant to what we have before us here?

22 MR. NOLAN: Well, I think it --

23 QUESTION: Certainly, it is in your own time, but
24 you haven't got much.

25 MR. NOLAN: I think that it is relevant, Your

1 Honor, because I think really that the White House tapes and
2 the public press conference are the core of this case. And
3 the question --

4 QUESTION: If there is absolute immunity, they
5 wouldn't be relevant to anything, would they?

6 MR. NOLAN: Well, they would, Your Honor, be
7 relevant to whether or not the President of the United
8 States was acting within the scope of his powers or the
9 duties prescribed by law for his performance. Now, you see,
10 we argue that he was not, and that is the heart of our scope
11 argument, that in firing Fitzgerald, not for the reasons
12 that are the basis of this case, but because of Fitzgerald's
13 rights under the Veterans Preference Act, Mr. Nixon was
14 doing an action which was prohibited to him by law.

15 Now, if that is right, if Presidents don't fire
16 employees in the Department of the Air Force, and if that is
17 well known and well established, as it is in the decisions
18 of this Court, as the Court knows, then there is a very real
19 question about whether Nixon in this instance, acting as
20 President of the United States, was acting within the scope
21 of his responsibilities, broad as that scope is.

22 QUESTION: Would you distinguish that from the
23 Myers case, that Chief Justice Taft wrote about the firing
24 of a postmaster?

25 MR. NOLAN: I will certainly try, Justice

1 Rehnquist. The distinction here, I believe, is, as the --
2 as the Court of Appeals found and as the District Court in
3 this case found, that Mr. Fitzgerald had a legislatively
4 protected position. He could not be removed summarily
5 from --

6 QUESTION: So did Myers, didn't he? Hadn't
7 Congress stated that the President could not remove him
8 without the consent of the Senate?

9 MR. NOLAN: Without the consent of the Senate,
10 yes. I think that the Myers case was decided quite a while
11 ago. Whether it remains a correct statement of the law in
12 its field or not may be open to question. But on the facts
13 of this case, I don't think there is any question about it.
14 The District Court found that the President of the United
15 States could not interfere with or terminate the employment
16 of Mr. Fitzgerald. He made that finding as a matter of law.

17 QUESTION: Could the Secretary of the Air Force?

18 MR. NOLAN: No. Absolutely not. Only in a
19 proceeding for cause. Now, see, there are only a few
20 alternatives in this case, and they have been the same, and
21 they have been presented consistently from the very
22 beginning. That was --

23 QUESTION: But the Secretary -- the Secretary
24 could start such a proceeding.

25 MR. NOLAN: The Secretary can start such a

1 proceeding. Clearly, yes, Justice White.

2 QUESTION: And the President could tell him to
3 start it.

4 MR. NOLAN: Yes. Clearly.

5 QUESTION: But the Secretary could say, sorry, but
6 you have no authority to do that, and the President would
7 say, well, I have authority to fire you, though.

8 (General laughter.)

9 MR. NOLAN: Yes. That is a script that --

10 QUESTION: Often happens, I suppose.

11 MR. NOLAN: Perhaps not often, but sometimes
12 certainly, and of course it has happened recently.

13 QUESTION: And that is within the President's
14 authority, isn't it?

15 MR. NOLAN: That definitely is within the
16 President's authority. I think it would also be within the
17 President's authority to direct the Secretary of the Air
18 Force to proceed for cause against Mr. Fitzgerald or any
19 other employee of the Air Force.

20 QUESTION: Yes.

21 QUESTION: Mr. Nolan, it is also clearly within
22 his authority to be involved in a reorganization of the Air
23 Force, isn't it? If it was a legitimate reorganization, you
24 wouldn't question his authority?

25 MR. NOLAN: Absolutely not. Unquestionably.

1 QUESTION: So isn't that one of the issues here?

2 MR. NOLAN: Yes. Yes. It is. And that is why,
3 in answer to your question, Mr. Chief Justice, I think that
4 is why, to that extent, the facts are significant here.

5 QUESTION: Suppose, to take an analogy, the clerk
6 of a court somewhere -- let's take a federal court to make
7 it simpler and more direct -- went to Congress and lobbied
8 against some proposition that the courts through their
9 regular channels, the judicial conference of the United
10 States, had supported, and the chief judge of that court
11 just fired him, or the court fired him, because of
12 disloyalty. Call it that if you want.

13 Any question but that the judge and the judges of
14 that court would be absolutely immune?

15 MR. NOLAN: Well, as you know, Mr. Chief Justice,
16 the case of immunity for a clerk of court is here now coming
17 up before the Court. I think that the question that you
18 pose would involve the following issues. It would involve
19 essentially the issue of absolute judicial immunity, and I
20 think that in previous decisions the Court has defined that
21 as requiring that the action at issue be a judicial act, or
22 that it be performed in the course of a judicial proceeding,
23 and there have been a number of cases on that issue.

24 In other words, if a judge were to act
25 administratively as distinguished from judicially, I think

1 that would raise a question of the interpretation of that
2 kind of action under the judicial immunity privilege.

3 I believe that the core issue, the heart of this
4 case is the issue of absolute Presidential immunity. I
5 think that it is certainly in the briefs, but there hasn't
6 been a great deal said about it in the course of this oral
7 argument --

8 QUESTION: Mr. Nolan, before launching into that,
9 would you address yourself to the effect of the settlement
10 agreement, please?

11 MR. NOLAN: Yes, Justice O'Connor. The settlement
12 agreement in our view is a limitation agreement placing a
13 limit on the defendants' liability, an upper and a lower
14 limit. There remains at issue the sum of some \$28,000
15 depending on the outcome of the case in this Court.

16 QUESTION: It is really almost a wager on how this
17 Court will rule, in effect.

18 MR. NOLAN: I would not so characterize it,
19 Justice O'Connor.

20 (General laughter.)

21 MR. NOLAN: Any more than any other lawsuit is a
22 wager by the parties at the time. I might say from Mr.
23 Fitzgerald's point of view that the settlement was extremely
24 important to him. He was at that time facing the prospect
25 of a lengthy, difficult, and expensive trial on the issues

1 that --

2 QUESTION: \$142,000 is a lot of solace.

3 (General laughter.)

4 MR. NOLAN: Well, it may be, Justice Brennan, but
5 it --

6 QUESTION: I mean, as a prudential matter, why
7 should we get into this?

8 MR. NOLAN: Well --

9 QUESTION: If you have bargained your way out of
10 it and the President -- ex-President has bargained his way
11 out of it?

12 MR. NOLAN: I might say that if the Court in its
13 wisdom should choose to dismiss the writ as improvidently
14 granted here, it would certainly involve no objection from
15 our side of the case, you understand.

16 QUESTION: I wouldn't think there would be.

17 QUESTION: But that isn't the suggestion. The
18 suggestion is that it is moot.

19 MR. NOLAN: I think that it quite clearly is not
20 moot, Justice White. I would like to be able to say that it
21 was moot.

22 QUESTION: The only case you are talking about
23 would be the Nixon case anyway.

24 MR. NOLAN: That is correct.

25 QUESTION: And I take it the way that the case is

1 presented here for the other parties, that the issue of
2 Presidential immunity is in those cases, too, because of the
3 derivative immunity claim.

4 MR. NOLAN: Yes, the issue of Presidential
5 immunity is in those cases, too.

6 QUESTION: Yes, but, Mr. Nolan, suppose even if,
7 as you say, the President acted outside the scope of his
8 authority, but suppose his aides did not. Then what?

9 MR. NOLAN: Well, the interesting thing, Justice
10 Brennan --

11 QUESTION: Suppose they acted within the scope of
12 their authority, whatever that was. Even if the President
13 did not.

14 MR. NOLAN: Well, then, it would be our position
15 that the question of immunity for them should be dealt with
16 under the method and standards and decisions of this Court,
17 and that you should look at it to see whether what they did,
18 whether their action was in the exceptional situation or
19 special function kind of test that this Court has required.

20 Interestingly enough, as Justice Stevens' comment
21 earlier indicated, that is not what they have said. They
22 have said, you know, Mr. Harlow said, look, Fitzgerald was
23 not in my wicket. I mean, they have said, we didn't have
24 anything to do with it at all. It wasn't within my scope of
25 authority. No, absolutely not. I didn't -- I was doing

1 something else.

2 So there is that kind of internal tension in their
3 cases, and the District Court found, of course --

4 QUESTION: Yes, but in the hypothetical situation
5 I put to you, I gather that the absolute immunity claim
6 could not be derivative from the President, if the President
7 had none because he acted outside the scope of his
8 authority. Isn't that right?

9 MR. NOLAN: That is clearly true, Justice
10 Brennan. I think it is also true that if this Court were to
11 find absolute immunity for the President of the United
12 States, that would not imply very much for the Presidential
13 assistants, particularly under the circumstances of this
14 case and under the circumstances of their involvement in it.

15 QUESTION: Mr. Nolan, in addition to the \$142,000,
16 your clients had reinstatement with back pay. What about
17 Mr. Richardson's argument that you have had all you have got
18 coming to you?

19 MR. NOLAN: Well, with all due respect to Mr.
20 Richardson, I don't think that that argument holds very much
21 water. I think that we tend to talk about this, and
22 properly so, in the context of this case in terms of things
23 like compensatory and punitive damages and right to jury
24 trial, and deterrent effect of the remedy, and those kinds
25 of considerations. I don't think that those considerations

1 in any way express the devastating impact of a firing of
2 this type on a man like Mr. Fitzgerald, who at age 43,
3 with --

4 QUESTION: But all you are asking is \$28,000.
5 That is all you want.

6 MR. NOLAN: That's --

7 QUESTION: That is all you want, right?

8 MR. NOLAN: That is almost right, Justice Marshal.

9 QUESTION: Is that right?

10 MR. NOLAN: As to Petitioner Nixon, that is true.

11 QUESTION: Right.

12 MR. NOLAN: But there are the other two defendants
13 in the other case.

14 QUESTION: You would analogize it to a libel or
15 slander case, where the person may not be able to show any
16 actual damages or per quad or per se or whatever the phrases
17 are, but simply wants to have his conduct vindicated?

18 MR. NOLAN: No, I would not, Justice Rehnquist. I
19 think to evaluate the question you really have to look at
20 the record in a broader scope, and perhaps it may be
21 possible in the course of this oral argument. I would
22 suggest to the Court, however, that a reading of the
23 Fitzgerald decisions -- there have been several by District
24 Courts and the Court of Appeals for the District of Columbia
25 -- where -- and they have dealt with things like attorneys'

1 fees, and interest on the overdue back pay, and so on, and I
2 think it is fair to say that those opinions reflect not just
3 a sympathy for Mr. Fitzgerald, but a frustration with the
4 law which did not allow, in their opinion, the relief that
5 he sought to be granted.

6 I don't want to make a bigger deal of this than it
7 is, but the impact on someone who has a brilliant, a really
8 distinguished record in government at that point and is
9 suddenly out, I mean, he is out of the Pentagon, he is out
10 of all Pentagon-related business as a practical matter --

11 QUESTION: May I respectfully submit that he is
12 not the only one?

13 MR. NOLAN: Excuse me, Justice Marshal. I don't
14 believe I --

15 QUESTION: That he is not the only one who has
16 been unjustly fired from government.

17 MR. NOLAN: That is certainly true. That is
18 certainly true.

19 QUESTION: All right. I was just wondering.

20 MR. NOLAN: But the question, I believe, was
21 directed to whether there is a measure of injury here beyond
22 that met by restoration and back pay. To terminate this
23 line, if I may, I think that probably the best single
24 response to that question was the opinion and judgment of
25 the United States District Court in the District of

1 Columbia, March 3, 1981, Chief Judge Bryant, who found that
2 after -- 12 years after the fact, eight years after the
3 litigation, whatever it is, that Fitzgerald had still not --
4 still not, after all this time, been restored to a position
5 that was equivalent to the position that he lost when he was
6 fired. So, that is how long it has gone on. He has paid
7 all of his legal expenses. He hasn't paid attorneys' fees.
8 But he has paid expenses, and he has paid for depositions in
9 Seattle, and so on.

10 QUESTION: When he got the back pay and
11 reinstatement, what job did they offer him?

12 MR. NOLAN: He was, I believe, a GS-17, and they
13 offered him another GS-17 position, and it had that pay, but
14 it didn't have the responsibility, and it didn't have the
15 duties, and it didn't have the authority, and it didn't
16 have --

17 QUESTION: It was not the old job that --

18 MR. NOLAN: Oh, no, it was not the old job. No.
19 There has been a lot in the news about that, you know, even
20 while he was on the old job, it changed from an evaluation
21 of the expense of sophisticated weapons system, the work he
22 was doing before, to doing a survey of bowling alleys in
23 Thailand that were maintained by the Air Force. No. It is
24 tough.

25 QUESTION: Is that before us? Is any of this

1 before us?

2 MR. NOLAN: Only in response to the questions of
3 the Court.

4 QUESTION: Well, let me ask you another one. What
5 was the total back pay in dollars and cents?

6 MR. NOLAN: The total back pay is in the record.
7 I would appreciate an opportunity to respond to that in more
8 detail later. It involved a period of time, some four
9 years, with deducts for the pay that he received from the
10 government, and questions about whether he had earned more --

11 QUESTION: I assume from that that it was a tidy
12 sum.

13 MR. NOLAN: It was approximately -- it was in the
14 magnitude of \$100,000 for four years. His pay was about
15 \$30,000 a year at the time he was fired.

16 QUESTION: Well, \$30,000 a year for four years is
17 more than \$100,000, isn't it?

18 MR. NOLAN: I know, but there were offsets,
19 Justice Marshal, that had to do with his government
20 employment and also his other outside employment, and he had
21 no money from January 5, 1970, until some time in 1974, when
22 the back pay award, when the first installment of it was
23 made. He had no money or income from this job or anything
24 related to it.

25 I think that perhaps I have imposed too much on

1 the Court.

2 QUESTION: But Mr. Nolan, this is really relevant
3 to the argument your opponent makes on whether there is an
4 implied cause of action, relying on the Fifth Circuit case.

5 MR. NOLAN: Oh, it is, very definitely.

6 QUESTION: And I am curious to know precisely what
7 elements of damage you claim in this proceeding from Harlow
8 and Butterfield that were not part of back pay and
9 reinstatement.

10 MR. NOLAN: Well, that would come out, Your Honor,
11 in the development of the case. The claims are \$500,000 for
12 compensatory damages and \$3 million for punitive damages.

13 QUESTION: Well, not dollars. I mean, what
14 uncompensated wrong is there that these defendants are
15 responsible for?

16 MR. NOLAN: Well, they are the position that
17 Fitzgerald was put in by the firing, and the long
18 unsatisfactory trail of litigation that he has been reduced
19 to as a result of that, and I don't --

20 QUESTION: In other words, legal expense? Is that
21 what it is? Costs of litigation? Is that the other
22 uncompensated item?

23 MR. NOLAN: Well, I think that certainly would be
24 included, and the costs of litigation have not been
25 insignificant over this period of time.

1 QUESTION: Mr. Nolan, what if 25 or 30 people had
2 participated in the same kind of conduct that you attribute
3 to Messrs. Butterfield and Harlow? On your theory, you
4 would collect from all 25 or 30 or 40 or 50?

5 MR. NOLAN: Well, if they are joint tort-feasors,
6 I suppose that would be the general rule. I think that in
7 cases of this type, you must necessarily have a particular
8 kind of proof, a demonstration of involvement. I think this
9 is a very unusual, very atypical case.

10 Justice White earlier asked a question about
11 dropping malice as a requirement from the qualified immunity
12 standard. I think that in most cases, particularly cases
13 involving the powers of the Presidency in large-scale public
14 acts, it would be very difficult or impossible for a
15 plaintiff to demonstrate malice.

16 Now, the difference here essentially comes down to
17 a single factor, and that is the White House tapes. The
18 press conference and the White House tapes. At the press
19 conference, when he got the question, Mr. Nixon said, I made
20 the decision on Fitzgerald. It wasn't made by someone down
21 the line. It was submitted to me and I made it, and I stick
22 by it.

23 And then, immediately thereafter, a matter of
24 minutes or perhaps a few hours, he discussed the same thing
25 in his own office, recorded on the White House tapes, and he

1 said, I gave that order. I said to get rid of Mr.
2 Fitzgerald. And he gave the reason for it. He said, it
3 wasn't just that he was complaining about the overruns, but
4 that he was doing it publicly. Now, that is an uncommon
5 kind of evidence, and of course it wasn't until 1978 that
6 Mr. Nixon was added to this case, long after the action had
7 been filed, and almost four years after he left the office
8 of President. It is a very unusual case.

9 I think I really should move along to our points.
10 We would contend that the claims to absolute immunity should
11 be denied here essentially for three reasons. First, that
12 this case very clearly does not present any of the
13 exceptional situations or special functions that this Court
14 has referred to as a requirement for absolute immunity in
15 its decisions. It very plainly doesn't.

16 Secondly, that in taking this action, the
17 President of the United States, vast as his powers are, and
18 broad as his authority is, exceeded that authority in that
19 he did something that not only he had no authority to do, it
20 wasn't something invested in him by law, it wasn't a duty in
21 the sense that other defendants in immunity cases have been
22 found to be carrying out the duties vested in them by law or
23 the duties that they performed or, as Justice Marshal said,
24 doing his job. It wasn't that at all. Presidents
25 historically and in the current day do not fire employees in

1 the Departments like the Department of the Air Force. And
2 we argue from that that he was acting outside the scope of
3 his authority, and therefore not entitled to immunity.

4 Thirdly, and in brief summary, we argue that a
5 finding of absolute Presidential immunity in this case would
6 impermissibly impinge on the functions of the judicial and
7 legislative branches of the government. It is the function
8 of the judicial branch to hear causes of action, to deter
9 violations of individual rights, and to vindicate them in
10 the course of its procedures. That function would be
11 frustrated by absolute immunity here.

12 More significantly, perhaps, would be --

13 QUESTION: But that is true of any case in which
14 we decide there is absolute immunity, like for judges, isn't
15 it?

16 MR. NOLAN: I don't believe it is to this extent,
17 Justice Rehnquist, and I think also that, if I may continue,
18 the impact on the Congress, on the legislative branch of the
19 government, is far sharper and far harder. It is
20 characterized in the amicus brief filed in this case, in
21 this Court, by a very broad selection of Senators and
22 Congressmen. It is characterized as devastating,
23 essentially because it is the function of the Congress to
24 legislate and to oversee the carrying out of the laws.

25 Now, particularly with regard to laws like this,

1 and particularly with regard to the circumstances of this
2 case, the information that it needs to legislate and to
3 exercise its oversight responsibility frequently can come
4 only from employees of the federal government, like Mr.
5 Fitzgerald.

6 There isn't any question, as the Court realizes, I
7 guess, there isn't any question about his testimony. It was
8 truthful and accurate, and in the sense that it was
9 predicting something that was going to come about later and
10 was not an established fact at that time, what it predicted
11 did come about. No one in the Air Force --

12 QUESTION: Can't we decide this case without that,
13 without passing on that? If we find immunity, we don't have
14 to be bothered with that, do we?

15 MR. NOLAN: If you find immunity --

16 QUESTION: Which is the point you just don't want
17 to discuss, it seems.

18 MR. NOLAN: I do want to discuss it.

19 QUESTION: Well, please do.

20 QUESTION: You haven't much time, Mr. Nolan.

21 MR. NOLAN: Well, I would say, since I don't have
22 much time, I would say in closing that if the Court should
23 find absolute immunity for the President in this case, it
24 very clearly should not find it for Harlow and Butterfield
25 or Presidential assistants, and it could not do so without

1 rearranging the disciplined process that it has gone through
2 in a host of other immunity decisions.

3 QUESTION: Do you think that the immunity that you
4 have -- the absolute immunity that you say would be so
5 dangerous is different in character or scope from the
6 absolute immunity granted to a prosecutor? Let's leave the
7 judges out of it. A prosecutor has certainly vast powers
8 which can and sometimes have been abused, but there is
9 absolute liability as a matter of broad public policy. None
10 of you have really addressed that in your oral arguments.

11 MR. NOLAN: Is it different in character and
12 scope? Yes. Very definitely, and very clearly. The
13 prosecutor's immunity, if we read the decisions of this
14 Court right, of course, is not absolute either. It is not
15 by virtue of his office. It is not an ex officio immunity.
16 It is, rather, only an immunity for initiating the
17 prosecution and presenting the state's case in court.

18 For all of the reasons suggested in Imbler v.
19 Pachtman and in Butz, we would find that it is -- that it is
20 different in character and different in scope. It is much
21 more limited in scope. It is clearly different in character
22 because it takes place in the course of the judicial
23 system. Now, this Court has recognized, and, I believe,
24 properly so, that there are a lot of considerations that
25 make that safer, that the judicial branch might fairly be

1 termed the least dangerous branch.

2 Those considerations are clearly not applicable to
3 executive officials, and I believe that the Court --

4 QUESTION: Isn't the prosecutor an executive
5 official?

6 MR. NOLAN: Well, he may be, Mr. Chief Justice --

7 QUESTION: He may be?

8 MR. NOLAN: -- in a status sense, in terms of
9 where his position is. But he is not in terms of the
10 considered judgment made about why he should have immunity,
11 and I think that --

12 QUESTION: Well, is not the prosecutor in the
13 federal system the arm of the Chief Executive of the country
14 to carry out the mandate to see that the laws are faithfully
15 executed?

16 MR. NOLAN: Clearly so. Clearly so. No question
17 about it. But --

18 QUESTION: So the subordinate would have an
19 absolute immunity, but the source of the authority would
20 have none, in your view.

21 MR. NOLAN: Well, in our view, Mr. Chief Justice,
22 immunity is not determined by where somebody is in
23 government. It is not determined by status or title or
24 position in a government hierarchial or organizational
25 sense. It is, rather, determined in the public interest in

1 each individual case, and with regard to the prosecutor,
2 prosecutors' immunity, as outlined by this Court in Imbler
3 and then the takeoff from it for other officials of the
4 executive department in Butz v. Economou, is, I think, quite
5 clearly placed in the judicial range, and the question of
6 whether or not there should be immunity, how much is a
7 deterrent needed, how safe is the process, all of those
8 kinds of considerations, which have been reviewed by the
9 Court, are in the context of a legal proceeding as
10 distinguished from an executive action.

11 Now, the Court's statements with regard to
12 executive action to the contrary point in the other
13 direction. I think the Court is quite clearly aware of the
14 broad sweeping authority that executives have, and the
15 dangers raised by that authority from the standpoint of
16 individual rights.

17 If there are any further questions, I would be
18 glad to answer them.

19 QUESTION: Mr. Nolan, you haven't talked very much
20 about the sources of your causes of action. What
21 Congressional evidence is there of an intention on the part
22 of Congress under either one of the statutes upon which you
23 rely to imply a cause of action against the President of the
24 United States.

25 MR. NOLAN: Could I take a detour and get into

1 that question, Justice Powell?

2 QUESTION: You can get to it any way you wish.

3 MR. NOLAN: I would like to raise again for the
4 Court the fact it is our position that the cause of action
5 issue, again with all due respect to my learned colleague at
6 the bar, is an imposition on the Court, and that the Court
7 should not consider it. It was clearly a collateral order.
8 It was not appealable, and it was not appealed.
9 Certification on it was denied. It was not presented as a
10 question in either cert petition.

11 Where it was referred to, in the
12 Harlow-Butterfield cert petition, they said, well, it is a
13 collateral order, not appealable, and we haven't appealed it.

14 QUESTION: What did the Court of Appeals do?

15 MR. NOLAN: The Court of Appeals dismissed.

16 QUESTION: Because they thought there was no
17 jurisdiction here? No jurisdiction in the Court to hear the
18 appeal?

19 MR. NOLAN: Because they thought that the issue of
20 absolute Presidential immunity, which was the only issue
21 that was up, was not unresolved at that time.

22 QUESTION: So you think they dismissed on the
23 ground it was a frivolous appeal on that issue?

24 MR. NOLAN: On the issue of absolute Presidential
25 immunity? I -- no, I would not say that they thought it was

1 a frivolous appeal.

2 QUESTION: Then why did they -- did they dismiss
3 on jurisdictional grounds or not? Or do you know?

4 MR. NOLAN: Well, I don't know, quite clearly.

5 QUESTION: I got the impression that they
6 dismissed on the authority of the Halpern case.

7 MR. NOLAN: Yes.

8 QUESTION: And yet I would have thought they would
9 simply affirm, citing Halpern in a situation like that.

10 MR. NOLAN: Well, I suppose that that was a
11 possibility.

12 QUESTION: Do you think -- is it clear that the
13 court thought the case was properly in that court? In the
14 sense that whatever order was being appealed was appealable?

15 MR. NOLAN: It is not clear, Your Honor. The only
16 thing that was being appealed was absolute Presidential
17 immunity. There wasn't anything about the inferred or
18 implied causes of action that was being appealed. That had
19 been denied certification by the District Court judge.

20 QUESTION: What was being appealed was the summary
21 judgment ruling, wasn't it?

22 MR. NOLAN: As stated in the notices of appeal, it
23 was a little more specific than that, Justice White, but
24 what was not being appealed, quite clearly, was the issue
25 that was late presented to this Court after the petition

1 for Certiorari was granted.

2 So, we would urge for those reasons that the Court
3 not entertain that issue. Now, we did --

4 QUESTION: You are not claiming we don't have
5 jurisdiction?

6 MR. NOLAN: No, absolutely not. Absolutely not.

7 QUESTION: And if we should entertain it, it
8 would, would it not, avoid the decision of a constitutional
9 question?

10 QUESTION: If we decided it one way.

11 QUESTION: Yes. I mean, it arguably would do that.

12 MR. NOLAN: That's correct.

13 QUESTION: So for that reason there might be a
14 prudential reason to consider it.

15 QUESTION: So how about --

16 MR. NOLAN: There might be prudential reasons --

17 QUESTION: So how about Justice Powell's question,
18 though?

19 QUESTION: Have you finished your answer to
20 Justice Powell?

21 (General laughter.)

22 MR. NOLAN: I think we are fairly here on the
23 constitutional issue and the two statutory issues. Read
24 together, the First Amendment and those statutes quite
25 clearly evidence a desire on the part of Congress that

1 employees like Fitzgerald be free to testify before the
2 Congress and to give the information that is called on for
3 them, and beyond that, a will to penalize anyone who
4 obstructs or interferes with that testimony.

5 Now, let me say in the dwindling moments of this
6 argument that it is treated in our brief, I hope
7 adequately. It is also treated in more detail in the
8 Congressional brief that I referred to earlier. I recommend
9 those selections to the Court.

10 QUESTION: But is there any Congressional evidence
11 as to the intention of Congress with respect to either one
12 of these statutes to impose liability on the President of
13 the United States in a damage suit?

14 MR. NOLAN: There is much Congressional evidence,
15 Justice Powell, of the will to achieve that purpose. The
16 purpose of preserving the right of free speech before
17 Congressional Committees and penalizing anyone who would
18 interfere with it. There are other inferences that I think
19 may fairly be drawn. If you are talking about a case like
20 this where it is the Executive Branch, and you are talking
21 about a statute like 18 US Code 1505, it may be asking too
22 much to expect that the Administration in these
23 circumstances would bring a criminal prosecution, although
24 that is a criminal statute, that it would bring a criminal
25 prosecution against someone who acted against Fitzgerald.

1 From that, I think it is fair to infer that if
2 there is not a cause of action here, you may never get cases
3 like this, and Congress clearly intended that that right be
4 asserted, and that it be protected.

5 If there are no further questions, thank you.

6 CHIEF JUSTICE BURGER: Thank you, gentlemen. The
7 case is submitted.

8 (Whereupon, at 11:25 o'clock a.m., the case in the
9 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Richard Nixon, Petitioner, v. A. Ernest Fitzgerald; and Bryce N. Harlow and Alexander P. Butterfield, Petitioners, v. A. Ernest Fitzgerald
No. 79-1738 and 80-945

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