BENCH MEMORANDUM

TO: Mr. Justice Powell
FROM: Dick Fallon
DATE: November 25, 1981
RE: Nos. 79-1738 and 80-945, Nixon v. Fitzgerald and Harlow v. Fitzgerald

Question Presented

The main question in this case involves the scope of a President's immunity from a private suit for damages arising from his actions as President of the United States. The immunity of presidential aides is also in issue. In addition,
there are jurisdictional questions. One concerns the "contingent settlement" negotiated by Nixon and Fitzgerald. Another involves the claim that this suit for damages is barred by congressional provision of an exclusive administrative remedy.

I. BACKGROUND

A. Facts

The events underlying this suit occurred during the waning days of the administration of Lyndon B. Johnson. The respondent Ernest Fitzgerald was at that time a Deputy Assistant Secretary for Management Systems of the Department of the Air Force. Late in 1968 Fitzgerald met with members of Senator William Proxmire's Subcommittee for Economy in Government of the Joint Economic Committee. Fitzgerald disclosed a pattern of cost over-runs involving the C-5A transport aircraft. On November 13, 1968 he testified publicly that cost overruns on the plane could approximate $2 billion.

At this juncture the facts become subject to dispute. For purposes of this Court's analysis, however, all of Fitzgerald's allegations should be taken as true.

Fitzgerald claims that his testimony caused a deterioration in his relationship with officials of the Johnson Administration. Shortly after his testimony Fitzgerald received notice that his career civil service status—given to him only shortly before the date of his congressional testimony—was being revoked. (The Civil Service Commission
found that the revocation constituted the correction of a bona
fide administrative error. JA 74a, 82a. Fitzgerald characterizes it as retaliation for his truthful testimony.)
In addition, Fitzgerald alleges that Johnson's Air Force Secretary, Harold Brown, advised his successor, Robert Seamans, that Fitzgerald could not be trusted and should not be retained.

According to Fitzgerald, Secretary Seamans had scarcely assumed office before he began to consider schemes to discharge Fitzgerald pursuant to an "office reorganization." With this in mind Seamans consulted White House aide Bryce Harlow in May and November 1969. White House aide Alexander Butterfield also wrote a memorandum in May 1969, in which he reported to his White House superior John Ehrlichman that Fitzgerald was "about to blow the whistle on the Navy." JA 274a. Butterfield said that he understood the matter to have been reported to the FBI. He apprised Ehrlichman in case other action might be appropriate.

Allegedly as a result of White House hostility, Fitzgerald's job was abolished as part of a reorganization that took effect on January 5, 1970. Secretary Seamans signed the reorganization order on November 3, 1969, and the decision was announced the following day.

Fitzgerald's firing attracted considerable publicity. In order to advise the President how to respond, at least one member of the White House staff, Clark Mollenhoff, telephoned Secretary Seamans to determine the basis for Fitzgerald's
discharge. In addition, Secretary Seamans consulted with White House aide Bryce Harlow on November 4, the day that Fitzgerald's firing was announced. White House staff included a summary of developments in the "briefing book" prepared in anticipation of a presidential press conference scheduled for December 8, 1969. In the book, staffer Patrick Buchanan urged the President to adopt Mollenhoff's recommendation and retain Fitzgerald. JA 267a. When queried at the press conference, however, President Nixon stated only that he would look into the matter. (According to a subsequently released White House tape, the President recalled that Harlow was "all for canning" Fitzgerald. JA 282a. Ronald Ziegler's recollection was different, and he so advised the President. Id.)

White House interest in the Fitzgerald case continued at least through January 1970. Butterfield was delegated to prepare a memorandum for the press office. In addition, Butterfield reported privately to Haldeman, to whom he recommended that Fitzgerald should not be reemployed.

Following his firing, Fitzgerald initiated an administrative proceeding before the Civil Service Commission (CSC) seeking reinstatement and backpay. He filed his claim on January 20, 1970. After three years of litigation, the case finally came up for public hearing in January 1973. On January 30, 1973, Secretary Seamans testified that he had "never received any instruction" from the White House regarding the Fitzgerald matter. But Seamans refused to answer further questions about his communications with the White House.
Seamans repeatedly invoked Executive Privilege.

As a result of the publicity attending the Fitzgerald hearings, President Nixon was again asked about the matter at a press conference of January 31, 1973. The President on this occasion took full responsibility for the termination of Fitzgerald's federal employment: "I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans must have been talking to someone who had discussed the matter with me. No, this was not a case of some person down the line deciding he should go. It was a decision that was submitted to me, and I stick by it." JA 185a.

The following day, however, the White House issued a retraction of the President's statement. According to the White House press office, the President had confused Fitzgerald with another civilian employee of the Defense Department. As reported by press secretary Ronald Ziegler, "[The President] indicated to me after reading the transcript of yesterday's press conference that he was mistaken in his reference to Mr. Fitzgerald and that the fact of the matter is that the President did not, as indicated yesterday in the press conference, have put before him the decision regarding Mr. Fitzgerald." JA 196a.

The Civil Service Commission issued its ruling on the Fitzgerald case on September 18, 1973. The CSC found that "the evidence of record does not support the allegation that his position was abolished ... in retaliation for his
[Congressional] testimony."  JA 81a.  But the CSC also ruled that the abolition of Fitzgerald's job "resulted from reasons purely personal to" him.  JA 86a-87a.  It therefore violated the governing statute, which established that reductions in force should be implemented without regard to the persons holding the affected positions.  Id.  On this basis the CSC ordered Fitzgerald reinstated, either to his old job or an equivalent position, with backpay.  JA 87a-88a.  The administrative award included no provision for interest or for punitive damages.

In January 1974 Fitzgerald instituted the present action in the U.S. District Court for the District of Columbia.  He sought $3.5 million in compensatory and punitive damages from eight Air Force and Defense Department officials and from Alexander Butterfield.  The district court dismissed the suit based on the district of Columbia's three-year statute of limitations.  384 F. Supp. 688 (1974).  The Court of Appeals affirmed the dismissal as to all defendants except Butterfield. Finding that Fitzgerald had no reason to know of Butterfield's involvement until 1973, the court permitted the suit against him to go forward.  553 F.2d 220 (1977).

Following the remand to the District Court, Fitzgerald filed a second amended complaint.  It was only at this late date in the litigation that the petitioners Nixon and Harlow were added as defendants.  The complaint alleged generally that they, together with unnamed others, had conspired to retaliate for Butterfield's testimony on the C-5A transport plane.  The
complaint asserted eight causes of action arising under the constitution, federal statutes, and the common law of the District of Columbia. Of these, only three remain. One is based on the First Amendment; one on 18 U.S.C. § 1505, a criminal statute proscribing retaliation against anyone for testimony given to a congressional committee; and one on 5 U.S.C. § 7211, which provides that the right of employees to furnish information to Congress "may not be interfered with or denied."

Upon Richard Nixon's being named as a defendant, the Justice Department moved on his behalf to dismiss the complaint on the ground that he was entitled to absolute immunity from civil liability for the actions alleged. Judge Gesell initially denied the motion based on the state of the record. After extensive discovery, he again denied a motion to dismiss. The Court of Appeals had by then rendered its decision in Halperin v. Kissinger, which found that the President did not enjoy absolute immunity from suits for civil damages. The various defendants in the action sought to appeal the denial of their immunity claims to the Court of Appeals. They claimed the right to do so pursuant to the collateral order doctrine. But the court of appeals summarily dismissed the appeal, apparently on the basis of Halperin v. Kissinger.

A petition to this Court ensued. After it was filed, but before it was granted, Nixon and Fitzgerald agreed to a "contingent settlement." On May 18, 1981, Nixon agreed absolutely to pay Fitzgerald the sum of $142,000.
Contingently, Nixon agreed to pay an additional $28,000 if two conditions were satisfied: (a) if this Court should grant the pending petition for cert and (b) if it should give a decision that would result in the District Court's dismissal of the case against Nixon "without additional adjudication of the facts, other than upon the record as it presently stands." On June 10, 1980, the parties filed a "Joint Statement" in this Court. The Statement asserted that "The parties have agreed at this stage to fix the amount of payments to which respondent would be entitled in this case, but the amount of payments depends upon this Court's disposition of the instant petition and subsequent proceedings in the District Court. Therefore the case has not been settled and is not moot."

The Court granted the petition on June 22, 1981. Shortly thereafter Morton Halperin filed papers seeking to intervene. Calling attention to the contingent settlement agreement, he alleged that the parties could not be trusted to contest the issues with all appropriate vigor. This Court denied the motion.

II. JURISDICTIONAL ISSUES

There are three possible jurisdictional barriers to a decision of this case on the merits: (a) the possibility that the settlement between Nixon and Fitzgerald has "mooted" the controversy between them or otherwise deprived them of the "concrete adversity" needed for them to invoke the jurisdiction of this Court; (b) the claim of petitioners Harlow and
Butterfield that Fitzgerald's administrative remedies before the CSC were intended by Congress to be exclusive and thus deprived the federal courts of jurisdiction to hear this suit; and (c) the argument that the district court's denial of absolute immunity is not an appealable "final order."

Although I do not regard any as a likely bar to reaching the merits, each deserves discussion.

A. The Settlement Agreement: Mootness Question

As a result of the settlement agreement between Nixon and Fitzgerald, there will never be a trial on the merits in the District Court. If this Court gives a decision in favor of Fitzgerald, he has agreed—in return for consideration of $28,000—to move in the District Court for dismissal. If this Court gives a decision in favor of Nixon on the question of "absolute immunity," then again there will be no trial.

On one view of Article III, this Court's only justification for deciding constitutional issues is to permit the adjudication of actual cases and controversies in the district courts. As a result of the settlement agreement, it can be argued that this case has ceased to be justiciable, because the parties have indicated that they do not wish to proceed to judgment in the district court—only to get an answer to the "absolute immunity" question, on which they have a "bet."

I find the "settlement agreement" troubling, because it gives the appearance that the parties—who have settled their main financial dispute—may nonetheless "buy" a decision of
this Court. Nonetheless, it is difficult to identify a jurisdictional doctrine under which dismissal would be required.

Mootness. The case is not moot. Both parties retain a financial stake in the outcome; and their interests continue to be adverse. It does not matter, I think, that there will be no trial in the district court. There would similarly be no trial in cases in which a purely legal issue was presented to this Court in a suit for a declaratory judgment—e.g., a case turning solely on the constitutionality of a state statute, under which a criminal prosecution was threatened. If this Court upholds the statute, the declaratory judgment issues without further trial. If the Court voids the statute, there will still be no further trial. In addition, the so-called "bet" in this case has not entirely replaced an interest in judicial resolution. It is obvious that both parties plan to return to the district court for the entry of a judgment, regardless of this Court's decision.

One way to assess the mootness argument is to compare this case to one in which the parties have bought "insurance" against an adverse judgment. Assume there were no agreement between Nixon and Fitzgerald, but that both sought to buy insurance in a private market. Nixon pays a private insurer $142,000, in return for which the insurer agrees to pay any judgment against him, less $28,000—i.e., Nixon would pay no more money if he won in this Court, and could pay no more than $28,000 if he lost. This is exactly where he stands under the
present contract. It is also possible to imagine Fitzgerald, through a private "insurance" of his financial interest in the outcome of the suit, getting into the same position in which he now stands. A contract of this kind—which resembles the sale of an interest in litigation—might offend public policy in some circumstances. But I would not think always. This is one way to analyze a plaintiff's agreement to pay a lawyer a "contingent fee."

Finally, I am told that private litigants not infrequently make "contingent settlement" agreements similar to that negotiated here. In private litigation, I am told (by another clerk), the parties sometimes agree to settle, with the amount of liability to depend on the district court's ruling on a particular pretrial motion—a discovery motion for example. It is easy to imagine cases in which the scope of permissible discovery would determine the settlement value of a claim. And it is hard to imagine a public policy against promoting settlements in such cases.

I am at a loss, however, to know how to investigate further the use of "contingent settlements" in private litigation. If I discover anything, I shall inform you.

Feigned and Collusive Cases

This Court has consistently refused to hear cases in which the parties, although formally independent, are cooperating to achieve the same result, e.g., Lord v. Veazie, 49 U.S. 251 (1850) (sale and suit on contract arranged in order to procure judgment on navigation rights on public river), and where the
interests of the parties, though formally adverse, are not adverse in fact, e.g., South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co., 145 U.S. 300 (1892) (pending appeal, ownership of both plaintiff and defendant corporations came into hands of same persons).

It is easy to distinguish the current case from cases of this kind. Nixon and Fitzgerald have adverse legal interests cognizable in a federal court--i.e., their interests in a resolution of the immunity question, which may be crucial to the outcome of a suit for damages. Their interests are adverse in fact: each stands to gain or lose financially, depending on how this Court decides the case. It is true that Nixon and Fitzgerald have structured their relationship in a way that most adverse parties do not. But this alone would not seem to defeat justiciability. The Court has permitted parties to go so far as purposely to create an adversary relationship solely in order frame a "test case." E.g., Evers v. Dwyer, 358 U.S. 202 (1958) (although the negro plaintiff had ridden bus only once, and did so in order to provoke an order to sit in the back, the controversy that resulted was still "real"). Here, there is no doubt that Nixon and Fitzgerald began in a concretely adverse relationship. If parties can deliberately create such a relationship in order to frame a justiciable controversy--and Evers v. Dwyer holds that they can--then, by the same logic, the parties here should be able to structure their relationship so that it would continue to be adverse.

Nonadversity With Regard to Granting of Cert
For a while it seemed to me to be troublesome that, following the conclusion of their contingent settlement agreement, Fitzgerald no longer held an interest adverse to Nixon's interest--asserted in his cert petition--in having this Court take the case on certiorari. Fitzgerald, though formally opposing a grant of cert, could collect an additional $28,000 only if this Court both granted cert and decided the issue favorably to him. It is disturbing that he did not confess this candidly. Nonetheless, his posture would not seem ultimately to defeat justiciability. The rules of this Court do not require a party to oppose a petition for cert. And it is easy to imagine cases--e.g., cases involving a split among the Circuits--in which both parties would be eager for this Court to resolve the split. Thus, from Fitzgerald's side, lack of adversity would not seem to be troublesome.

Nixon's stake in the cert petition is less easy to fit into a traditional legal category. Following his settlement agreement with Fitzgerald, in a financial sense Nixon no longer stood to gain anything if the Court took the case; under no circumstances would Fitzgerald be required to pay Nixon anything. On the other hand, a grant of cert put Nixon in a position where he could lose up to $28,000. Yet he was the petitioner.

After he entered the settlement agreement, I do not think that Nixon had a legally cognizable interest, of the kind needed to support "standing" to bring a suit, in having this Court grant certiorari. His financial interest lay in
dismissal. Any other interest was "abstract" in the sense of being unrelated to his conflict with Fitzgerald. But I am not sure that this matters. At every stage of judicial decision—from decision in the district court through decision by this Court—there would be concrete adversity between the parties. It is adversity at these stages that is needed to frame issues in a proper light for judicial resolution.

**Integrity of the Judicial Process**

As the commentators have often noted, it is hard to reconcile all of this Court's justiciability decisions. Curiously, the decisions most difficult to fathom are several of those in which the Court has denied justiciability. Of the seeming anomalies, two seem to me to require some passing mention. They are *Muskrat v. United States*, 219 U.S. 346 (1911) and *United States v. Johnson*, 319 U.S. 302 (1943).

*Muskrat* involved a dispute over entitlement to share in money and lands due to the Cherokee Nation. By a legislative act of 1906, Congress expanded the class of those entitled to claim as Cherokees. By legislative act of 1907, Congress then conferred federal jurisdiction to hear a suit by those Cherokees disadvantaged by the 1906 act, by which they were required to divide their settlement into more, smaller shares. Muskrat sued under the 1907 jurisdictional act. Naming the United States as defendant, he argued that the 1906 act was unconstitutional because it deprived him of a property interest without just compensation. This Court held there was no Article III jurisdiction, on the ground that Congress had
effectively asked the Court to render an advisory opinion.

In the other case, United States v. Johnson, the Court dismissed a suit in which the plaintiff was not in fact adverse. Though the plaintiff did have an actionable claim that the rent he was forced to pay in excess of the limit imposed by a federal rent control statute, the plaintiff was in fact paid to bring the suit by the defendant in the action, who wanted to litigate the constitutionality of the federal statute. The Court explained that "Such a suit is collusive because it is not in any real sense adversary. It does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court." This was held to be so even though the United States had intervened and stood prepared to defend the constitutionality of the challenged statute. With the government in the case, adversariness was patent. Nor could there be any question of the adequacy of the representation.

It is easy to cite cases in conflict with both Muskrat and United States v. Johnson. And neither of course bears directly on this case. But both can be best explained, I think, by reference to this Court's concern to maintain the integrity of judicial form. Both cases involved justiciable "issues," if they had been framed by parties to a "real" lawsuit. And there was adversary representation in both. But litigants in both—the United States in Muskrat and the collusive private
plaintiffs in Johnson—had conspicuously asked the Court to decide questions merely because they wanted them answered. Though an appropriately adversary posture was developed, that adversity bore insufficient resemblance to the kind of real-world adversity that courts exist to resolve. It smacked of manipulation.

It is hard to extract a legal principle. But I think the Court should be bothered about what Nixon and Fitzgerald have done, for essentially the same reasons that I think troubled the Court in Muskrat and in United States v. Johnson. If it decides to reach the merits— as I have no doubt that it can—I think that there may still be an unfortunate devaluation of the integrity of judicial form. If so, this cost should be faced.

B. Allegedly Exclusive Administrative Remedies

The petitioners Harlow and Butterfield invite this Court to avoid the immunity question by ruling that Fitzgerald has no federal cause of action.

At the outset, it seems clear that this issue need not bar the Court from reaching the immunity question. Indeed, the "cause of action" question itself need not be reached, as it was not among those raised in the cert petition. This case is here under the "collateral order" doctrine for a decision of the immunity issue. The "cause of action" question can still be raised following a final judgment.

Nor does Fitzgerald's pursuit of administrative remedies—reinstatement and backpay from the civil Service Commission—necessarily bar him from seeking more complete judicial relief.
Where an agency possesses "primary jurisdiction" over the subject matter of a dispute, a plaintiff must ordinarily take his grievance there in the first instance. The Court has enforced this rule even in cases where the administrative agency can give only partial relief. See, e.g., Far East Conference v. United States, 342 U.S. 570 (1952). Resort to a judicial forum is subsequently barred only when Congress intended an alternative remedy to be exclusive. See New York Gaslight Club v. Carey, 447 U.S. 54, 66 (1980).

In this context it seems clear that Congress intended to impose no special limits on remedies that would otherwise be available. (This is not, of course, to say that Congress affirmatively intended that judicial relief would be available. See infra.) Fitzgerald was a member of the unclassified civil service. He was able to challenge his dismissal only because of his veterans' status: Congress has provided veterans with this special benefit. Thus, if Fitzgerald were not a veteran, he would have had no administrative relief whatsoever. The question thus becomes: Did Congress, in giving veterans a special right to administrative relief before the CSC, intend to preempt a cause of action for damages that would otherwise exist under federal statutes or the Constitution? Without doing extensive research in the legislative history, the question answers itself. Congress intended to favor veterans, not to deprive them of a benefit that they would otherwise have enjoyed.

But would Fitzgerald, otherwise, have had a cause of
action for damages? Although it need not be reached, I point to this question now, for the following reason. In last year's draft opinions in Halperin v. Kissinger, your "second version" would have held that Halperin had no Bivens claim against the President, due to the "special factors" attaching to the President's constitutional status. In this case, by contrast, Fitzgerald claims three causes of action: two "implied" rights under federal statutes as well as a Bivens action under the First Amendment. It is in many ways attractive to deal with the immunity issue on Bivens grounds: no cause of action against the President. In this case, however, the immunity issue would still arise unless the Court also held that Fitzgerald had no cause of action under either of the federal statutes. It seems to me entirely plausible to argue that he would not. In light of the decision in the recent implication case involving the CFTC, however, it seems doubtful that this would be a winning argument.

I shall return to this issue in the discussion "on the merits."

C. Appealable Collateral Order

Although a question is raised, I think the objection is frivolous. Immunity "was designed to protect [officials] not only from the consequences of litigation's results, but also from the burden of defending themselves." Helstoski v. Meanor, 442 U.S. 500, 508 (1979), quoting Dombrowski v. Eastland, 387 U.S. 82, 85 (1967). In order to protect the interests that immunity serves, this Court has at least twice allowed
interlocutory appeals of immunity defenses under the Cohen "collateral order" doctrine. Helstoski, supra (denial of claim of immunity under Speech and Debate Clause); Abney v. United States, 431 U.S. 651 (1977) (denial of immunity claimed under double jeopardy clause). Before the D.C. Circuit's decision in this case, all courts of appeals to consider the issue had agreed: denials of claims of executive immunity are similarly appealable. Although the Court of Appeals did not explain its summary denial in this case, it seems most reasonable to think that there was no colorably appealable issue under the law of the Circuit, established by Kissinger v. Halperin, 606 F.2d 1192 (CADC 1979).

III. MERITS: CONTENTIONS OF THE PARTIES

I do not think that the parties add much to the arguments exhaustively rehearsed in Kissinger v. Halperin. As I understand the cases, there are two main differences, both probably more relevant to the arguments developed by Justice White than to those presented in your circulated drafts. First, there is no federal statute, involved here, that directly creates a cause of action arguably enforceable against the President. Fitzgerald's cause of action, if any, arises by implication from one of two narrower statutes or from the Constitution itself. Your "absolute immunity" position permits you to bypass the question whether a cause of action can be inferred under either of those statutes. The cert petitions presented no "cause of action" question; this Court can decide the immunity question without reaching it.
I am uncertain, however, what approach Justice White might take. There seem to be two lines open to him. First, in order to "deconstitutionalize" the issue, Justice White might argue (a) that a cause of action can be inferred under one or both of those statutes; (b) that the relief available is so thorough as to make a decision on the Bivens claim unnecessary; and (c) that no "judge-made" immunity is needed under the statutes. Alternatively, he could take just the opposite approach: He could argue that Fitzgerald simply lacks a cause of action and that no immunity issue is therefore presented.

Accordingly—if my analysis is correct—you might find it necessary, in order to show that Justice White must treat immunity as a constitutional issue under the First Amendment cause of action, to argue that no cause of action can be inferred under the statutes. (You need not do so to reach the immunity issue as presented by the parties—only if you think it expedient to attack the "diversionary" approach adopted last year by Justice White.) Again, depending on Justice White's approach, you might not. Unfortunately, the parties devote little space or energy to analysis of the statutory basis for Fitzgerald's claimed cause of action.

As the briefs are not very helpful, I summarize their arguments only briefly.

A. Arguments of the Petitioners

1. Arguments of the Petitioner Nixon

In essence Nixon advances three arguments. First, he argues that the President has historically been recognized as
immune from civil liability. (The purpose of this argument is to respond to the guidelines of Butz v. Economou, 438 U.S. 478, 508 (1978): "In each case we have undertaken 'a considered inquiry into the immunity historically afforded the relevant official at common law and the interests behind it.'") As evidence he cites historical practice: For nearly 200 years, suits against the President were "exceedingly rare." Brief at 22. The Federalist Papers and the debates at the Constitutional Convention suggest that impeachment was intended as an exclusive remedy. Justice Story, in his Commentaries, spoke explicitly of the President's "official inviolability."

Second, a recognition of absolute Presidential Immunity is "essential for the conduct of the public business." The President is an obvious target for suits by dissatisfied citizens and public employees. The costs of such lawsuits—in time as well as money—would place an unacceptable drain on the presidential office. Discovery is especially burdensome. Against these costs must be weighed the largely inconsequential benefits of allowing the President to be sued for damages. Damages liability adds little to the deterrent effects of impeachment and criminal liability. An array of administrative and judicial remedies exists under Civil Service statutes and the Federal Tort Claims Act. These provide adequate compensation to victims of unlawful action. In this regard, it must be recognized that qualified immunity has proved inadequate to its purpose. It constructs no effective barrier to frivolous pleadings, and it permits ruinous discovery.
Third, absolute immunity is necessary to protect the integrity of the executive branch. The possibility of civil discovery threatens the confidentiality of presidential communications. As this Court has recognized in cases implicating the Speech or Debate Clause, "judicial oversight" would "realistically threaten to control" the conduct of officials of a coordinate branch. Gravel v. United States, 408 U.S. 606, 617 (1972); see United States v. Helstoski, 442 U.S. 477, 491 (1979) (purpose of privilege is to "preserve the constitutional structure of separate, coequal, and independent branches of government).

2. Defendants Harlow and Butterfield

These defendants offer the argument that Fitzgerald has no cause of action, and that the Court should decide the case on this basis. Fitzgerald seeks to imply a cause of action under two federal statutes and the Constitution.

(a) The First Federal Statute, 5 U.S.C. § 7211. This is a section of the Civil Service Act, which provides that "The right of employees, individually or collectively, to ... furnish information to either House of Congress, or to a committee of Member thereof, may not be interfered with or denied." It expressly provides no right of action. The petitioners advance a variety of reasons why there can be no implied action under this provision. First, this Court established in Davis v. Passman, 442 U.S. 279 (1979), that statutory causes of action would be implied less readily than rights to sue under the Constitution. Second, under a statute,

(b) The Second Federal Statute, 18 U.S.C. § 1505. This is a criminal statute, which provides penalties for interfering with witnesses before congressional committees and government agencies. This Court has been reluctant to imply rights of action from criminal statutes. Here, Fitzgerald is not even a member of the class for whose especial benefit the statute was enacted. Section 1505 was designed to protect the legislative process, not to benefit witnesses. Cf. Odell v. Humbel Oil & Refining Co., 201 F.2d 123 (CA 10), cert denied, 345 U.S. 941 (1953) (plaintiffs suing for employment discharge allegedly caused by grand jury testimony not entitled to any right of action under a related statute, § 1503, because it was enacted for "protection of the public" rather than for the benefit of plaintiffs).

(c) Bivens Action Under the First Amendment. As this Court recently reaffirmed in Carlson v. Green, 446 U.S. 14, 18 (1980), a Bivens action "may be defeated in a particular case when defendants demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress.'"
In this case at least three such special factors are present. First, there is the special status of the defendants: the President of the United States and his personal advisers. Second, as the Fifth Circuit recently recognized in Bush v. Lucas, 647 F.2d 573, 576 (CA5 1981), affirming on remand 598 F.2d 958 (CA5 1979), the "unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a Bivens remedy," because the federal government should be accorded the "widest latitude" in administering its internal affairs. This Court has recognized repeatedly that the role of the Government as an employer toward its employees is fundamentally different from its role as sovereign over private citizens generally. E.g., Sampson v. Murray, 415 U.S. 61, 83 (1974); Arnett v. Kennedy, 416 U.S. 134, 168 (Powell, J., concurring)("Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs"). Third, the availability of an alternative remedial scheme constitutes a special factor counselling hesitation.

On the merits of the immunity question, petitioners argue that the public interest requires recognition of absolute immunity for the President's closest aides. "Again and again the public interest calls for action which may turn out to be founded on a mistake in the face of which an official may later find himself hard put to satisfy a jury of his good faith." Gregoire v. Biddle, 177 F.2d 579, 581 (CA 2 1949), cert denied,
339 U.S. 949 (1950). This insight is confirmed by experience, which has shown that qualified immunity is inadequate to serve its protective purposes. Suits against presidential aides result in discovery of documents requiring confidentiality.

If this Court is unwilling to recognize the absolute immunity of presidential aides, it should at least adopt an application of the immunity doctrine that better conduces to summary disposition of frivolous suits. One possibility was ably stated in Judge Gesell's concurring opinion in Halperin v. Kissinger, supra, 606 F.2d at 1215: "[A] plaintiff should be required to make a stronger showing on the immunity question before being permitted to proceed to trial. I would hold that the plaintiff must establish after the completion of discovery and before trial commences, not merely the existence of a genuine dispute as to some material issue of fact but also, by the preponderance of the evidence or through clear and convincing evidence, that the official failed to act with subjective or objective good faith."

Finally, petitioners argue that their actions concerning Fitzgerald all occurred "within the outer perimeters of their line of duty." Barr v. Matteo, 360 U.S. 564, 575 (1959). Accordingly, they are entitled to claim the full immunity attaching to their offices.

C. Arguments of the Respondent Fitzgerald

Fitzgerald argues that there is neither a constitutional nor a judicial basis adequate to support absolute immunity. The Constitution provides Congress with the Speech or Debate
Clause, but gives no similar shield to the executive branch. The impeachment remedy redresses injuries done to the body politic itself. It was not intended as a substitute for civil remedies. Thus, when Thomas Jefferson was sued for a trespass allegedly occurring while he was President, he invoked a plea much more like qualified that like absolute immunity. He claimed that the act was "done under a law of congress, and in his character of president of the United States, without malice." The suit was ultimately dismissed, not because of immunity, but because it was brought in the wrong district. *Livingston v. Jefferson*, 15 F. Cas. 660 (CCD Va. 1811) (No. 8,411).

The modern immunity cases clearly establish that "rank" is irrelevant to "immunity." Immunity attaches only to the functions for which it is necessary—the prosecutorial and judicial functions.

And the claim to "derivative immunity," which is asserted by Harlow and Butterfield, is both bizarre and "ahistorical." It would hold "that a Henry Kissinger of a James Schlesinger enjoys an absolute immunity while serving in the White House, but forfeits this immunity when he assumes the greater responsibilities of a Cabinet office."

Absolute immunity is not needed to protect the performance of the presidential office. The White House lawn is not swarming with process servers. In any event, Nixon is a former, not a sitting, President. If any limitation were needed, a limitation of suits against incumbent Presidents.
would suffice. Yet the courts have not thought this necessary
with regard to injunctive remedies. See, e.g., Youngstown

Nixon argues that absolute immunity is essential to
preserve the separation of powers and prevent judicial review
of presidential motives, thought processes, and communications.
But this is essentially the same argument twice before
presented and twice before rejected in Nixon v. Administrator
of General Services, 433 U.S. 425, 443 (1977), and United
damage suits—especially after a President has completed his
term of office—are surely far less intrusive than judicial
orders commanding of restraining executive action.

Finally, although he asserts that the "implication"
question is not properly before the Court, Fitzgerald contends
that he does in fact have an implied cause of action under two
federal statutes and under the Constitution.

(a) First Statutory Basis, 5 U.S.C. § 7211. This statute
creates rights for the benefit of federal employees, a clearly
identified class of which Fitzgerald is a member. Congress
passed the original version in 1912. Its intent, as expressed
then, was "to protect employees against oppression and in the
right of free speech and the right to consult their
Representatives." Nonetheless, Congress did not provide an
administrative remedy at the time it enacted the provision;
criminal sanctions were not available until 1940; and there was
no express provision for backpay until 1948. It thus seems
clear that Congress meant to create a right of action in 1912, and there is no indication of a subsequent intent to withdraw that right.

(b) The Second Statutory Basis, 18 U.S.C. § 1505. Concentrating mostly on the first statutory claim, Fitzgerald's brief makes little attempt to justify his claim under this criminal statute.

(c) The Bivens Claim Under the First Amendment. Fitzgerald argues that no special factors counsel against a Bivens remedy. Lucas v. Bush, supra, the CA5 case relied on by the petitioners, is distinguishable. Congress had not, as here, expressly prohibited the conduct for which the suit was brought. To the extent that Bush holds personnel decisions too sensitive to be reviewed at all, it is simply wrong. Executive discretion in this area is broad, but it is not unreviewable.

D. Briefs of Amici

The amici add virtually nothing. The Solicitor General has filed precisely the same brief that the Government submitted a year ago, not even changing the cover.

Briefs in support of the respondent have been filed by a collection of Members of Congress, ranging from Orrin Hatch to Barney Frank; by the Government Accountability Project of the Institute for Policy Studies; and by the Mountain States Legal Foundation.

IV. ANALYSIS

The main difference between this case and last Term's Kissinger case is that this case involves an attempt to "imply"
causes of action under two federal statutes. This could complicate the case in any of several ways, most of which are reflected in what follows.

A. Last Term: The Powell Approaches

Last Term in Kissinger v. Halperin you circulated two "versions" of an "absolute immunity" opinion. Version I assumed the existence of a Bivens cause of action, then held the President entitled to absolute immunity. This approach remains open on the facts of this case. The main difference is that the Court would probably also need to assume--although it would not need to hold--that a statutory cause of action also exists.

Version II would have held that no Bivens action could be implied against the President. His constitutional stature would have counted as a "special factor" counseling hesitation in the absence of affirmative action by Congress. This approach also remains open, but with a caveat. In order to reach the Bivens question, the Court would first probably need to decide that there was no cause of action under either of the statutes. It would seem very, very odd to assume the existence of causes of action under the statutes, then inquire whether there was a cause of action under the Constitution.

B. Last Term: The White Approaches

Justice White also circulated two versions last Term. But his differed less than yours. In both he began with the assumption that Congress had expressly created a cause of action against the President under Title III. His question,
which he then answered in the negative, was whether the Constitution barred the Congress from subjecting the President to damages liability.

This year the question cannot be framed the same way. The statutory cause of action—if it exists at all—must be implied. I am not sure how Justice White may assess the relevance of this difference. If Congress intended to create an implied cause of action, there would presumably be no difference. On the other hand—purely as an evidentiary matter—it may be more than usually significant that Congress failed to create a cause of action expressly. To subject the President to damages liability is a serious matter. If Congress had intended to do so, wouldn't it have said so expressly? I do not know what Justice White would say. Much depends on how one views the President—how different he seems from other executive officers.

At the constitutional level, Justice White took a narrowly "functional" approach to the immunity issue. He argued that immunity attached to the performance of functions, not the offices of persons who performed them, and that good faith immunity adequately protected the wiretapping function. This year he could take a similar approach, so defining the function involved here as not to require absolute immunity.

One other possibility might be worth mentioning. Justice White could conceivably attempt to make the immunity issue disappear altogether, by denying that any cause of action exists at all.
My guess, however, is that he will find an implied cause of action at least under 5 U.S.C. § 7211, which provides that "The right of employees, individually or collectively, to ... furnish information to either House of Congress, or to a committee member thereof, may not be interfered with or denied."

C. The Powell Approaches Compared: Applications to This Case

To assume a cause of action, proceeding directly to the immunity questions, is an "all or nothing" approach—both constitutionally and tactically. In taking it you would need to hold that Congress cannot, by statute, subject the president to damages liability; and that judges, in construing the constitution, may not do so either. This would be a very strong holding, which you may find attractive. There is also the question whether it could win a Court.

A subsidiary approach is possible, but unattractive. The Court could, as a matter of judicial self-restraint, uphold absolute immunity in actions based on the Constitution. At the statutory level, however, it could evade the question whether Congress could knowingly subject a President to damages liability by treating an implied cause of action as one arising under "federal common law." By doing so, it could claim the authority of cases upholding absolute immunity under the common law, e.g., Barr v. Matteo. This approach is unattractive, however, because of your views about implied rights of action—that judges have no common law power to create them, and that the central inquiry concerns congressional intent.
Accordingly, the other plausible approach would be to examine the causes of action individually. The Court could do this—although it did not grant cert on any "cause of action" question—essentially on the theory that the "immunity" question necessarily includes the question: Immunity from suit under what constitutional provision or what statute? This connection is necessary if the Court is not to assume that it must answer the immunity question on the broadest possible constitutional basis—i.e., that absolute immunity is always available to the President, or that it never is. I am sure that some justices would dislike addressing the "cause of action" question without the benefit of a decision by the Court of Appeals. ¹ But it should surely be considered, for several

¹There are two interconnected bases on which the Court could reach this question. Under Rule 21.1(a), the Court may address any issue "fairly comprised" within the questions presented in the cert petitions. In their petition in 80-945, Harlow and Butterfield raised as their second question: "Whether petitioners, as senior advisers to the President of the United States, should be subjected to trial and the risk of civil damages from a person claiming injury from an adverse personnel decision of a federal executive department?" I think that this question can fairly be said to subsume the question whether there has been a cause of action stated against them. This basis is related to the precedent established by Justice White's opinion in Procunier v. Navarette, 434 U.S. 555, 559-60 n.6 (1978). In that case the Court granted cert on the question whether the respondent had stated a cause of action against prison officials. But it then treated this question as "comprising" the question "whether petitioners knew or should have known that their alleged conduct violated Navarette's constitutional rights." Id. This of course was in order to establish whether there was a factual predicate for a decision of the case on immunity grounds; and it was on this immunity basis that the Court in fact decided in favor the petitioner. Procunier can thus be read as holding that the "immunity" and "cause of action" questions are so intimately related that a decision of one properly entails a decision of the

Footnote continued on next page.
reasons.

(1) With respect to the statutory cause of action, this approach would exploit the fact that the plaintiff seeks to imply his right to sue for damages. The immunity question would be hardest, I think, in a case in Congress had said clearly that the President would be liable in damages. Here Congress has not said this. As I suggested above, I think that silence is powerful in this context. If Congress had intended to make the President liable, would it not have said so?

There are two statutes under which a cause of action could be implied. One is a criminal statute, 18 U.S.C. § 1505. I think it would be easy to reject the implication attempt under this statute. The other is 5 U.S.C. § 7211, which provides that the right to testify before Congress "may not be interfered with." The legislative history is obscure; I intend to do more research. Provisionally, I would have to say that the argument for implication is stronger under this statute.

other. Finally, if necessary it could (correctly) be argued that Rule 21 is not jurisdictional, and that the Court is free to dispose of a case on any proper basis, especially where necessary to avoid large holdings of constitutional law. The Procunier opinion hinted at this: "In any event, our power to decide is not limited by the precise terms of the question presented. Blonder-Tongue Laboratories, Inc. v. University Foundation, 402 U.S. 313, 320 n.6." In this connection it appears that the Court's celebrated decision in Erie Railroad v. Tompkins, 304 U.S. 64 (1938), effectively answered a question--i.e., whether prior decisions of the Court should be reversed--that was not presented in the petition. As a final resort, 28 U.S.C. § 1254 establishes the power of this Court to review any aspect of cases "in the courts of appeals."
But there are alternative remedies. And, to repeat myself, the President is the President. In his case, surely, I would think that unusually persuasive evidence of congressional intent would be required.

A problem with this approach, at the statutory level, might arise from the cases of Harlow and Butterfield—with regard to whom the implication question might look different. However, based on the availability of alternative remedies, I think that you would probably be comfortably in holding that no cause of action could fairly be implied.

(2) Concerning the Bivens action under the Constitution, this approach would allow the Court to rely on "special factors" counselling hesitation. Here there would be two, which seem to me to mesh nicely. The first is the status of the President. The second is the function in which the President, in this case, was acting (if at all)—that of the chief of personnel and organizational structure. It is undisputed that Fitzgerald lost his job pursuant to a reorganization. Structuring the government is a quintessential executive function. Moreover, assuming that it frequently results in people losing their jobs, it is one in which the President is peculiarly vulnerable to suit; it is also—which I think is crucial—one in which the fear of being sued could frequently deter the President from acting independently in the public interest. A plaintiff should not be able to arouse such fear through ingenious pleading that his dismissal constituted retaliation for First Amendment activities.
Again, however, the non-presidential defendants raise inconvenient questions. In which of their functions, if any, should they be entitled to absolute immunity in matters of personnel selection and organization of the government? I would be inclined to answer that, once again, the "special factors" defeat Bivens liability—leaving open the question what liability Congress could impose by statute, if it expressly did so.

D. The Relevance of Peculiar Facts

Whichever your "version" of approach, I think that the main question is how far to rest on the favorable facts of this case—how narrowly to write an opinion. As a matter of constitutional jurisprudence, I would be inclined to put the matter on narrow grounds, hinting perhaps that broader grounds were available but need not be invoked: Congress did not explicitly impose liability on the President and should not be presumed to have done so, at least in this delicate area in which the President (a) is performing the crucial executive function of structuring the government and thereby eliminating employees and (b) could easily be deterred from fearless performance of that function by the threat of civil suits by fired federal employees. These considerations are equally powerful in assessing the question of immunity in a suit arising under the Constitution.

The argument involving the sensitivity of the President's functions relevant to this particular case could be fashioned to fit the approach of either Version I or Version II.
Depending on the breadth of an opinion that would hold a Court, could be extended across a broader range of functions than I have suggested. Alternatively, I suppose it could be used as a kind of exemplar to justify absolute immunity for a President in the exercise of all his functions. I do, however, think that some use should be made of it. In my view, Justice White's strongest argument last year was that absolute immunity has traditionally attached to functions, not to offices; and that it has been associated especially closely where fear of liability could influence an official's decision about how to behave. *Imbler v. Pachtman* is illustrative of both points.

The more that an opinion moves to a clearly "functional" view, the better it accords with the tenor of the case law—and thus, in my view, the more powerful the legal analysis.

V. CONCLUSION

I close with an apology for being somewhat unfocused. There are many, many directions that the Court could take. I have been somewhat uncertain which to pursue.

My tentative views:

(1) The Court has jurisdiction to hear this case, though I have prudential doubts—based on the appearance of manipulation—about whether it ought to do so.

(2) Assuming that it exercises its jurisdiction, the Court is free to inquire into Fitzgerald's alleged causes of action—the approach that it would seemingly have to take in order to pursue the analytical approach of last Term's Version II.

(3) The President's functions at issue here can be
characterized in very favorable terms, implicating the fear that civil liability could deter a President from making personnel decisions in the public interest. The more narrowly the "immunity net" is cast, more the opinion comes within the precedential ambit of Imbler v. Pachtman and other cases in which absolute immunity has been upheld. Narrowness would have equal benefits under the "special factors counselling hesitation" inquiry mandated in the Bivens inquiry of the Version II approach.