Dear Chief:

As I wrote yesterday afternoon, I am entirely willing to confer - as you suggest. It may possibly shorten our discussion if I respond to what I now understand to be your objection to note 27. You say that it "significantly undermines the entire holding of the case", and that the opinion "gives intimations that Congress - under some circumstances - could change it".

Then you quote Harry's conclusory, off-hand statement that my opinion is contradictory, and that the Court "cannot have it both ways".

I respond to these points. Having devoted, in total, more time on the Nixon case last Term, and on Nixon and Harlow this Term, than on any half a dozen cases since I have been on the Court, I have no intention of "undermining" the end product of all of this labor. So far as I know, you are the only member of the Court who entertains this view. Nor do I find in the opinion any "intimations" that it would be lawful for Congress to impose specifically a damages liability.

I come now to what we will call Harry's "can't have it both ways" dictum. As I have said to you and others with us in this case, my own view is that it would be unconstitutional for Congress to impose a damage liability on the President.

But I cannot say that it is irrational to think that reasonable minds may not differ if Congress were to enact specific legislation, identifying certain limited types of conduct that would justify a damages remedy if a President knowingly violated the statute. Moreover, I followed your opinion in the Nixon tapes case in applying what in effect is a balancing type of analysis. A statute duly adopted by Congress, and signed by an incumbent President, certainly would be a new factor - not present in this case - that a court would weigh. In the Nixon tapes case you engage in precisely the same type of weighing constitutional and policy considerations.
Proceeding on the theory that we do not decide constitutional issues not presented, I have included the reservation — to which you object in note 27 — in every circulation since my first draft of March 17.

After Byron argued that we must assume that implied private causes of action exist in this case (as is correct), I enlarged note 27 as a response to him. Under the collateral order doctrine, we are addressing only the immunity issue. You will recall your insistence that we write the case this way, rather than dispose of it on the theory that there was neither a Bivens remedy nor an implied cause of action. Therefore, our holding will be that at least where there is only an implied cause of action, the immunity of a President is absolute.

I repeat, however, that I will be happy to discuss all of this further.

Sincerely,

[Signature]

The Chief Justice

LFP/vde
MEMORANDUM
79-1738 Nixon v. Fitzgerald

In his dissenting opinion, Harry states he cannot "understand the Court's holding that the absolute immunity of the President is compelled by separation-of-powers concerns, when the Court at the same time expressly leaves open ... the possibility that the President nevertheless may be fully subject to congressionally-created forms of liability." The two concepts, he contends, "cannot coexist."

In my view Harry is simply wrong. His argument misapprehends the balancing approach to separation-of-powers questions prescribed by recent decisions of this Court. Our unanimous opinion in the Nixon Tapes Case is a highly relevant example. In language substantially identical to that used to describe the President's absolute immunity in this case, the Court stated that the President's evidentiary "privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." 418 U.S., at 708. Nonetheless, in the Tapes case, and despite finding that the privilege was constitutionally mandated, we held that other factors of constitutional weight could be more weighty in a particular case. See pp. 711-712:
"In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice."

The reservation in this case merely represents an application of the balancing analysis applied in United States v. Nixon. Like the President's evidentiary privilege, absolute Presidential immunity fairly may be described as "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." In this sense the President's absolute immunity is "constitutional." At the same time, however, the constitutional factors mandating absolute immunity can be described, under a balancing approach, as defining the weight only on one side of the scale.

In this case at p. 16, my opinion says:

"We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers..."

My opinion holds that the constitutional grounds supporting absolute Presidential immunity outweigh the arguments advanced by BRW for civil damages liability.

In the unlikely event that Congress acts directly to impose liability, another constitutional factor would have to be considered: Namely, the fact that Congress had enacted legislation approved by the incumbent President, that purported to impose a damages liability. The
reservation in note 27 of my opinion merely acknowledges this. It does not suggest that the constitutional arguments supporting immunity would be diminished in such a case. Nor does the reservation imply how the balance then would be struck in such a case. The reservation simply acknowledges that direct congressional action would confront this Court with a different case and a different constitutional question—a question that need not be decided now, even though the method of analysis would be the same.

My opinion's approach thus accords with the Court's settled, prudent policy of avoiding unnecessary decisions of constitutional questions.

L.F.P., Jr.
In Justice White's note 2 he suggests - prior to today - Presidents, prosecutors, judges, congressional aides and other officials, "could have been held liable for the kind of claim put forward by Fitzgerald - a personnel decision made for unlawful reasons." [emphasis added] This is simply not so. The law has not heretofore permitted a plaintiff to recite "magic" words and have the incantation operate to make the immunity vanish. Moreover, and more fundamentally, Justice White errs in treating all of the above named officials as if the scope of their authority were identical. The authority of a President, head of the executive branch of our government - a wholly unique office - is far broader than that of any other official. As the Court states a President has authority in the course of personnel changes in an executive department to make personnel decisions. This is not to say that, in a given case, it would not be appropriate to raise the question whether an official - even the President - had acted "within the scope of [the official's] constitutional and statutory duties". The doctrine of absolute immunity does not extend beyond such action.
June 10, 1982

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

Dear Lewis:

I am amending my concurring opinion in this case as follows:

(a) Insert on page 1, after first full paragraph the following:

However, that does not mean a President is "above the law." Nixon v. United States, 418 U.S. 683 (1974). The dissents are very wide of the mark to the extent that they imply that the Court today recognizes a sweeping immunity for a President for all acts. The Court does no such thing. The immunity, as spelled out by the Court today, is limited to decisions and actions within the scope of a President's constitutional and statutory duties. Ante, at 20-22, n. 34. A President, like a Member of Congress, a judge, a prosecutor or a congressional aide, all with absolute immunity, is not immune for acts outside official duties that inflict injury on others. "Straw men" are, of course, more easily toppled than real ones.

(b) Insert on page 5 after line 2 (the final sentence of the opinion), the following:

Far from placing a President "above the law" the Court's holding places a President on essentially the same footing with judges and the other officials whose absolute immunity we have recognized.
In footnote 27 the Court suggests that "we need not address directly" whether Congress could create a damages action against a President. However, the Court has addressed that issue and resolved it; once it is established that the Constitution confers absolute immunity, as the Court holds today, legislative action cannot alter that result. Nothing in the Court's opinion is to be read as suggesting that a constitutional holding of this Court can be legislatively overruled or modified. *Marbury v. Madison*, 1 Cranch 137 (1803).

Regards,

Justice Powell

P.S. You can easily trigger a Tuesday release by sending a memo when the full print comes around tomorrow. On J'd be glad to initiate it.
MEMORANDUM
79-1738 Nixon v. Fitzgerald

In his dissenting opinion, Harry states he cannot "understand the Court's holding that the absolute immunity of the President is compelled by separation-of-powers concerns, when the Court at the same time expressly leaves open ... the possibility that the President nevertheless may be fully subject to congressionally-created forms of liability." The two concepts, he contends, "cannot coexist."

In my view Harry is simply wrong. His argument misapprehends the balancing approach to separation-of-powers questions prescribed by recent decisions of this Court. Our unanimous opinion in the Nixon Tapes Case is a highly relevant example. In language substantially identical to that used to describe the President's absolute immunity in this case, the Court stated that the President's evidentiary "privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." 418 U.S., at 708. Nonetheless, in the Tapes case, and despite finding that the privilege was constitutionally mandated, we held that other factors of constitutional weight could be more weighty in a particular case. See pp. 711-712.
"In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice."

The reservation in this case merely represents an application of the balancing analysis applied in United States v. Nixon. Like the President's evidentiary privilege, absolute Presidential immunity fairly may be described as "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." In this sense the President's absolute immunity is "constitutional." At the same time, however, the constitutional factors mandating absolute immunity can be described, under a balancing approach, as defining the weight only on one side of the scale.

In this case at p. 16, my opinion says:

"We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers."

My opinion holds that the constitutional grounds supporting absolute Presidential immunity outweigh the arguments advanced by BRW for civil damages liability.

In the unlikely event that Congress acts directly to impose liability, another constitutional factor would have to be considered: Namely, the fact that Congress had enacted legislation approved by the incumbent President, that purported to impose a damages liability. The
reservation in note 27 of my opinion merely acknowledges this. It does not suggest that the constitutional arguments supporting immunity would be diminished in such a case. Nor does the reservation imply how the balance then would be struck in such a case. The reservation simply acknowledges that direct congressional action would confront this Court with a different case and a different constitutional question—a question that need not be decided now, even though the method of analysis would be the same.

My opinion's approach thus accords with the Court's settled, prudent policy of avoiding unnecessary decisions of constitutional questions.

L.F.P., Jr.
The dissenters, reaching for authority to support their position, cite a current edition of Time magazine. Apart from the novelty of citing a popular magazine on a constitutional issue, the article, of course, made no reference to damages liability. Rather, its statement merely reflected the judgment of this Court in the Nixon tapes case and the impeachment resolution of the House Judiciary Committee. Contrary to the contention of the dissenters, and President's continuing amenability to these forms of legal process demonstrates the transparent fallacy - rather than the correctness - of the dissenting view. This case involves only immunity from
private damage suit liability for decision and actions within the scope of a President's authority.
June 11, 1982

79-1738 Nixon v. Fitzgerald

Dear Chief:

As your revised concurring opinion has now been circulated, I write to say that I am ready for the case to come down - provided, of course, the dissenting Justices also are ready.

Is there a possibility that we could do this on Tuesday?

Sincerely,

The Chief Justice

1fp/ss

Cc: Conf.
June 11, 1982

Re: 79-1738 - Nixon v. Fitzgerald

Dear Lewis,

I shall not be ready in Nixon by Tuesday.

Sincerely yours,

[Signature]

Justice Powell

Copies to the Conference
cpm
June 11, 1982

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

MEMORANDUM TO THE CONFERENCE:

I will add to Note 2 page 2 the following:

"75000 public officers have absolute immunity from civil damage suits for acts within the scope of their official function."

Regards,

[Signature]
June 11, 1982

79-1738 Nixon v. Harlow

Dear Chief, Bill, John and Sandra:

First, we welcome the constructive and supportive changes made by the Chief Justice in his concurring opinion.

I now ask your advice. In Byron's latest circulation, his note 2 on page 4 cites Time magazine. This presents a rather tempting "target". What would you think of my adding a note — as enclosed — as a separate paragraph in note 42 at the end of our opinion on page 25?

As we may be able to bring this case down on Tuesday, I would appreciate your thoughts this morning if convenient.

Sincerely,

The Chief Justice
Justice Rehnquist
Justice Stevens
Justice O'Connor

lfp/ss
for acts outside official duties. The immunity of a President from civil suits is not simply a doctrine derived from this Court’s interpretation of common law or public policy. Of course we are “guided” by the Constitution, ante, at 15, but absolute immunity for a President for acts within the official duties of the Chief Executive is to be found in the constitutional separation of powers or it does not exist. The Court today holds that the Constitution mandates such immunity and I agree.

The essential purpose of the separation of powers is to allow for independent functioning of each co-equal branch of government within its assigned sphere of responsibility, free from risk of control, interference, or intimidation by other branches. United States v. Nixon, 418 U. S. 683, 706-707 (1974); United States v. Gravel, 408 U. S. 606, 617 (1972). Even prior to the adoption of our Constitution, as well as after, judicial review of legislative action was recognized in some instances as necessary to maintain the proper checks and balances. Den on the Dem. of Bayard & Wife v. Singleton, 1 Martin 42 (N.C. 1787); Cases of the Judges of the Court

In their “parade of horribles” and lamentations, the dissents also wholly fail to acknowledge why the same perils they fear are not present in the absolute immunity the law has long recognized for numerous other officials. The dissenting opinions manifest an astonishing blind side in pointing to that old reliable that “no man is above the law.” The Court has had no difficulty expanding the absolute immunity of Members of Congress, and in granting derivative absolute immunity to numerous aides of Members. United States v. Gravel, 408 U. S. 606 (1972). We have since recognized absolute immunity for judges, Stamp v. Sparkman, 488 U. S. 349 (1978), and for prosecutors, Imbler v. Pachtman, 424 U. S. 409 (1976), yet the Constitution provides no hint that either judges, prosecutors or Congressional aides should be so protected. Absolute immunity for judges and prosecutors is seen to derive from the common law and public policy, which recognize the need to protect judges and prosecutors from harassment. The potential danger to the citizenry from the malice of thousands of prosecutors and judges is at once more pervasive and less open to constant, public scrutiny than the actions of a President.
of Appeals, 4 Call’s 135 (1788). Cf. Marbury v. Madison, 1 Cranch 137 (1803). However, the Court’s opinion correctly observes that judicial intrusion through private damage actions improperly impinges on and hence interferes with the independence that is imperative to the functions of the office of a President.

Exposing a President to civil damage actions for official acts within the scope of the Executive authority would inevitably subject presidential actions to undue judicial scrutiny. The judiciary always must be hesitant to probe into the elements of presidential decision-making and such judicial intervention is not to be tolerated absent imperative constitutional necessity. United States v. Nixon, 418 U. S., at 709–716.\(^3\) No such intervention is warranted in the present case, as the Court holds.

The enormous range and impact of Presidential decisions—far beyond that of any one Member of Congress—inescapably means that many persons will consider themselves aggrieved by such acts. Absent absolute immunity, every person who feels aggrieved would be free to bring a suit for damages, and each suit—especially those that proceed on the merits—would involve some judicial questioning of Presidential acts, including the reasons for the decision, how it was arrived at, the information on which it was based, and who supplied the information. Such scrutiny of day-to-day decisions of the Executive Branch would be bound to occur if civil damage actions were made available to private individuals. Although the individual who claims wrongful conduct may indeed have sustained some injury, the need to prevent large scale invasion of the Executive function by the judiciary far outweighs the need to vindicate the private claims. We have decided that in a similar sense Members of both Houses of Congress—and their aides—must be totally free from judicial scrutiny for legislative acts; the public interest, in other

\(^3\) See also United States v. Burr, 4 Cranch 469, 507 (1807).
words, outweighs the need for private redress of one claim­
ing injury from legislative acts of a Member or aide of a Mem­ber. The Court's concern, and the even more emphatic con­cerns expressed by JUSTICE WHITE's dissent, over "unremedial wrongs" to citizens by a President seem odd when one compares the potential for "wrongs" which thou­sands of Congressional aides, prosecutors, and judges can theoretically inflict—with absolute immunity—on the same citizens for whom this concern is expressed.

Judicial intervention would also inevitably inhibit the pro­cesses of Executive Branch decision-making and impede the functioning of the Office of the President. The need to de­fend damage suits would have the serious effect of diverting the attention of a President from his executive duties since defending a lawsuit today—even a lawsuit ultimately found to be frivolous—often requires significant expenditures of time and money, as many former public officials have learned to their sorrow. This very case graphically illustrates the point. When litigation processes are not tightly-con­trolled—and often they are not—they can and are used as mechanisms of extortion. Ultimate vindication on the mer­its does not repair the damage.¹

¹ United States v. Gravel, 408 U. S. 606 (1972). The Federal Tort Claims Act of 1946 reflects this policy distinction; in it Congress waived sovereign immunity for certain damage claims, but pointedly excepted any "discretionary function or duty ... whether or not the discretion involved be abused." 28 U. S. C. § 2680(a) (1976). Under the Act damage result­ing from discretionary governmental action is not subject to compensation. See, e. g., Dalehite v. United States, 346 U. S. 15 (1953). For such inju­ries Congress may in its discretion provide separate nonjudicial remedies such as private bills.

In this case Fitzgerald received substantial relief through the route pro­vided by Congress: the Civil Service Commission ordered him reinstated with backpay. Joint App. 87a–88a.

¹ Judge Learned Hand described his feelings:

"After now some dozen years of experience I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and
I fully agree that the constitutional concept of separation of independent co-equal powers dictates that a President be immune from civil damage actions based on acts within the scope of Executive authority while in office. Far from placing a President above the law, the Court’s holding places a President on essentially the same footing with judges and other officials whose absolute immunity we have recognized.


* In footnote 27, ante, the Court suggests that “we need not address directly” whether Congress could create a damages action against a President. However, the Court has addressed that issue and resolved it; once it is established that the Constitution confers absolute immunity, as the Court holds today, legislative action cannot alter that result. Nothing in the Court’s opinion is to be read as suggesting that a Constitutional holding of this Court can be legislatively overruled or modified. Marbury v. Madison, 1 Cranch 137 (1803).
June 14, 1982

Dear Chief:

It might be well to respond to BRW's attempt to distinguish types of immunity on the ground of whether "a personal decision allegedly was made for unlawful reasons".

BRW says this is a kind of claim "put forward by Fitzgerald". Apparently BRW is saying that neither a judge nor prosecutor would have immunity if there were such an allegation. I can scarcely believe he is serious. Prosecutors, in particular, make personal decisions every day as to whom they will prosecute and who knows whether their reasons would be viewed as lawful if immunity turned on this? The same can be said as to judicial decisions, particularly in close cases involving personal judgments as to morality, what will be popular with the public when a judge is facing reelection, and the like.

If Nixon ordered Fitzgerald to be fired as part of personnel changes in the Defense Department, this clearly was within his Executive authority.

BRW states that you "fail to grasp [this] difference". He deserves a response, and I hope you will give him one.

Perhaps the library could find for you a case involving the prosecutor in New Orleans who was so controversial. His name was Garrison. I think we had a cert petition filed here by one of his victims who made a strong case that he had been prosecuted purely for vindictive and personal reasons.

If you elect to answer BRW, I may add a sentence at the end of the final footnote in the Court opinion making a cross reference to your response to the dissenters argument that we are elevating the President "above the law".

Sincerely,

The Chief Justice
LFF/vde
June 14, 1982

Dear Chief:

I must correct my letter delivered to you earlier, as I had misread one word in Byron's opinion. He used "personnel" rather than "personal". The mountain of material that we have to read induces mistakes!

You had a better perception of what Byron was saying. He overlooks the central point that the President, vested by the Constitution with the authority of the Executive Branch of government, certainly has jurisdiction over personnel matters. The scope of authority of judges and prosecutors is more limited than that of a President. Yet all three possess absolute immunity only when they act within their authority.

Sincerely,

The Chief Justice

LFP/vde
In his dissenting opinion, post, at 1, Justice BLACKMUN states he cannot "understand the Court's holding that the absolute immunity of the President is compelled by separation-of-powers concerns, when the Court at the same time expressly leaves open ... the possibility that the President nevertheless may be fully subject to congressionally-created forms of liability." The two concepts, he contends, "cannot coexist." Id., at 2. Justice BLACKMUN's argument misapprehends the balancing approach to separation-of-powers questions prescribed by such cases as Nixon v. General Services Administration, 433 U.S. 425, 443 (1977) and United States v. Nixon, 418 U.S. 683, 703-713 (1974). In the Nixon Tapes Case, for example, the Court stated that the Constitution mandated judicial recognition of an evidentiary privilege protecting the communications of the President of the United States. In language similar to that used today to describe the President's absolute immunity, we characterized that evidentiary privilege as "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." 418 U.S., at 708. Nonetheless, despite finding that the privilege was
constitutionally mandated, we held that other factors of constitutional weight could be so compelling as to overcome the privilege in a particular case. Our reservation in this case is consistent with this balancing approach. It acknowledges that action by Congress might be considered a factor of constitutional weight, which might require the Court to reexamine the balance on the constitutional scale. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring). We do not suggest that the constitutional arguments supporting Presidential immunity would be diminished in such a case. Nor do we imply how the balance then would be struck. We simply acknowledge that explicit congressional action would confront this Court with a different case.
Reaching for authority to support the dissenting position, Justice WHITE purports to derive support from a current edition of Time magazine. But the issue that he quotes does no more than report the unremarkable proposition, with which we are in full agreement, that the President is not above the law. This unusual source thus would provide legal support for the dissent only if Time should share the dissent's persistent error—that of confusing immunity from damages liability with being "above the law." The Time article of course made no reference to damages liability. Rather, its statement referred to the judgment of this Court in the Nixon tapes case and of the House Judiciary Committee in voting an impeachment resolution. The President's continuing amenability to these forms of legal process demonstrates that the President remains as much subject to the law today as ever before.

The immunity recognized today extends only to private suits for damages based on decisions and actions within the scope of a President's authority.
In Justice White's note 2 he suggests - prior to today - Presidents, prosecutors, judges, congressional aides and other officials, "could have been held liable for the kind of claim put forward by Fitzgerald - a personnel decision made for unlawful reasons." [emphasis added] This is simply not so. The law has not heretofore permitted a plaintiff to recite "magic" words and have the incantation operate to make the immunity vanish. Moreover, and more fundamentally, Justice White errs in treating all of the above named officials as if the scope of their authority were identical. The authority of a President, head of the executive branch of our government - a wholly unique office - is far broader than that of any other official. As the Court states a President has authority in the course of personnel changes in an executive department to make personnel decisions. This is not to say that, in a given case, it would not be appropriate to raise the question whether an official - even the President - had acted "within the scope of [the official's] constitutional and statutory duties". The doctrine of absolute immunity does not extend beyond such action.
June 15, 1982

TO: MR. JUSTICE POWELL
FROM: DICK FALLON
RE: Changes in Nixon

Your letter seems perfectly appropriate. Attached are the clean copies of the two suggested additions, with your changes entered. If you want to change the format before circulating these to other Justices, either Sally or Ginny would know how to "get" the files from my Atex. Or I could make changes myself.
June 15, 1982

79-1738 Nixon v. Fitzgerald

Dear Chief, Bill, John and Sandra,

In view of Byron's additions on pages 4-5 and 30 of his opinion, and the fact that this case now will not come down until next week, I no longer can resist the temptation to respond.

One of my proposed notes addresses specifically Byron's reliance on Time magazine in his "eye-catching" note 2.

The second suggested addition is a response primarily to Harry's statement that our opinion is internally contradictory. Again, possible misunderstanding here could be clarified, by emphasizing the parallel with the Court's decision - and its rationale - in United States v. Nixon.

If you approve, I will add these notes to what I hope will be a final circulated draft.

I am grateful to each of you for "staying with me" during this long (and now boring!) process.

Sincerely,

The Chief Justice
Justice Rehnquist
Justice Stevens
Justice O'Connor

lfp/ss
June 15, 1982

79-1738 Nixon v. Fitzgerald

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Sincerely,

[Signature]

The Chief Justice
Justice Rehnquist
Justice Stevens
Justice O'Connor

1fp/ss
Re: No. 79-1738 - Nixon v. Fitzgerald

June 15, 1982

Dear Lewis:

I can't conceivably understand why you insist on reviving the issue that, between us, we have blurred. You now emphasize:

We do not suggest that the constitutional arguments supporting Presidential immunity would be diminished in such a case. [i.e., if Congress acted]. Nor do we imply how that balance would be struck. We simply acknowledge that explicit congressional action would confront this Court with a different case.

(A different case yes, but precisely the same result.)

For me this undoes virtually all the reconciling you and I have struggled with for days now. And it is wholly unnecessary since John found my opinion acceptable.

I am unwilling to hedge on this issue as the opinion now does, and Jackson's sole view in Youngstown carries no weight with me. I would not even cite it.

Let Byron "rant" on this point but don't fall into the trap of answering him and rendering the opinion unacceptable to me.

I'm ready to talk if you wish.

Regards,

Justice Powell

After talking to CJ, I abandoned this "trial balloon": He <H>Henry<K> it would undercut his concurrence.
The parties, through their counsel, hereby stipulate and agree as follows:

1. The United States Air Force ("Air Force") shall assign A. Ernest Fitzgerald to the position of Management Systems Deputy to the Assistant Secretary of the Air Force (Financial Management) effective June 21, 1982. The job description for this position is attached as Exhibit 1 and incorporated into this Settlement Agreement.

2. The Air Force shall in good faith assign Fitzgerald tasks and work assignments commensurate with the position of Management Systems Deputy to the Assistant Secretary of the Air Force (Financial Management) and provide him with the appropriate resources to carry out these assignments. Fitzgerald shall in good faith perform the tasks assigned to him in this position.

3. Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, this action is dismissed with prejudice subject only to the jurisdiction of the Court to enforce the terms and conditions of this Agreement. Should any party to this Settlement Agreement believe that any other party or parties have violated any provision of the Agreement, that party may file a motion in Civil Action No. 76-1486 alleging violation of the Settlement Agreement and the Court shall entertain such application to determine its validity and whether relief is appropriate.
4. On February 6, 1984, the Air Force shall file a written report to this Court describing in detail the assignments given Fitzgerald in the position of Management Systems Deputy to the Assistant Secretary of the Air Force (Financial Management).

5. Simultaneously herewith the parties have filed a joint motion asking the Court to vacate the March 31, 1982, Memorandum and Order issued in this case. Whether this Court grants or denies this joint motion shall not affect the instant Settlement Agreement.

6. The Air Force shall pay to Fitzgerald's counsel on the date of the Court's approval of this Agreement the sum of $200,000 as attorneys' fees and costs for legal services provided plaintiff in this action. This payment shall constitute full satisfaction of any and all claims for attorneys' fees and costs, and plaintiff and his counsel hereby waive any and all claims against defendants for attorneys' fees and costs incurred in connection with these proceedings.

7. This Settlement Agreement does not constitute, and shall not be construed, as an admission of liability by the defendants nor as a concession by any party as to the correctness of any legal position or factual assertion advanced by any other party in this action.
I. INTRODUCTION:

The incumbent of this position acts for and assists the Principal Deputy and Assistant Secretary for Financial Management as Management Systems Deputy with responsibility and authority necessary for the development of improved management controls and broader use of statistical analysis within the Air Force.

II. DUTIES AND RESPONSIBILITIES:

1. The Management Systems Deputy is responsible at the highest Air Force level for policies and procedures regarding:
   (a) Integrated performance measurement, cost control and reduction
   (b) Economic cost effectiveness analysis
   (c) Management information and control systems
   (d) Productivity enhancement and measurement
   (e) Statistical programs and analysis.
   (f) Cost estimating and cost analysis.

2. Provides guidance and direction to the Air Staff and the Commands for the development and/or implementation of management information and control systems, resource management systems and associated data bases.

3. Formulates, establishes and implements policies and procedures for the Air Force productivity program including development of productivity enhancement goals and necessary reporting systems.

4. Responsible for Air Force integrated performance measurement including cost control and reduction activities. This responsibility includes supervision of Air Force performance measurement activities including cost/schedules control systems criteria (C/SCSC). Responsible for development of new systems and improvements of current systems for cost control and cost reduction, for application of "should cost" and related analyses and synthesis techniques to Air Force cost estimating, and for Air Force economic cost effectiveness analysis.

5. Performs or directs analyses and reviews of Air Force operational plans, mobilization plans, programs for foreign aid and other data, upon which financial requirements for resources are based, in order to develop or direct the development of effective management control systems.

EXHIBIT 1
6. Develops policies and procedures, and monitors the implementation of Air Force statistical programs including methods of analysis and presentation.

7. Serves as an advisor to the Assistant Secretary (Financial Management) while he is appearing before congressional committees. Serves on such committees and boards as specified by the Principal Deputy/Assistant Secretary.

8. Testifies before Congressional committees when requested.

9. Assures necessary program coordination between the Department of the Air Force, Department of Defense and other government agencies.

10. Accomplishes management studies and special projects as assigned by the Principal Deputy (Financial Management) or the Assistant Secretary (Financial Management).

Supervision Exercised: Incumbent is delegated necessary authority to carry out assigned duties and has authority to utilize resources, including manpower, as required to satisfactorily discharge the duties of his office.

III. CONTROLS OVER WORK:
Reports to the Principal Deputy/Assistant Secretary (Financial Management). Supervision is limited normally to status reports furnished to the Principal Deputy/Assistant Secretary (Financial Management) for purposes of keeping them informed and/or for further guidance and direction. Accomplishes assigned duties and responsibilities with a high degree of individual initiative and creativity. Requires a high degree of professional stature.

IV. OTHER SIGNIFICANT FACTS:
This position requires access to TOP SECRET information. Sensitive under paragraph 4b(2)(g), AFR 40-3. Incumbent has direct access to information and is authorized travel to visit Air Force field activities and contractors as necessary to perform duties described herein.