President's unique status under the Constitution distinguishes him from other executive officials. A rule of absolute immunity for the President will not leave the nation without sufficient protection against misconduct on the part of the chief executive. There remains the constitutional remedy of impeachment. In addition, there are formal and informal checks on Presidential action that do not apply with equal force to other executive officials. The President is subject to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment. Other incentives to avoid misconduct may include a desire to earn re-election, the need to maintain prestige as an element of Presidential influence and a President's traditional concern for his historical stature. The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President "above the law." For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.

By Justice White, Dissenting I do not agree that if the office of President is to operate effectively, the holder of that office must be permitted, without fear of liability and regardless of the function he is performing, deliberately to inflict injury on others by conduct that he knows violates the law.

In Marbury v. Madison (1803), the Court observed that while there were
“important political powers” committed to the President for the performance of which neither he nor his appointees were accountable in court, “the question, whether the legality of the act of the head of a department be examinable in a court of justice or not, must always depend on the nature of the act.”

The Court nevertheless refuses to follow this course with respect to the President. It makes no effort to distinguish categories of Presidential conduct that should be absolutely immune from other categories of conduct that should not qualify for that level of immunity. The Court instead concludes that whatever the President does and however contrary to law he knows his conduct to be, he may, without fear of liability, injure Federal employees or any other person within or without the Government.

Attaching absolute immunity to the office of the President, rather than to particular activities that the President might perform, places the President above the law. It is a reversion to the old notion that the king can do no wrong.

“A Privilous Contention”

The Court casually, but candidly, abandons the functional approach to immunity that has run through all of our decisions. Indeed, the majority turns this rule on his head by declaring that because the functions of the President’s office are so varied and diverse and some of them so profoundly important, the office is unique and must be clothed with office-wide, absolute immunity. This is policy, not law, and in my view, very poor policy.

The suggestion that enforcement of the rule of law — i.e., subjecting the President to rules of general applicability — does not further the separation of powers, but rather is in derogation of this purpose, is bizarre. Regardless of what the Court might think of the merits of Mr. Fitzgerald’s claim, the idea that pursuit of legal redress offends the doctrine of separation of powers is a frivolous contention passing as legal argument. It cannot be seriously argued that the President must be placed beyond the law and beyond judicial enforcement of constitutional restraints upon executive officers in order to implement the principle of separation of powers.

The majority may be correct in its conclusion that “a rule of absolute immunity will not leave the nation without sufficient remedies for misconduct on the part of the chief executive.” The remedies in which the Court finds comfort were never designed to afford relief for individual harms. Rather, they were designed as political safety valves. Politics and history, however, are not the domain of the courts; the courts exist to assure each individual that he, as an individual, has enforceable rights that he may pursue to achieve a peaceful redress of his legitimate grievances.

I find it ironic, as well as tragic, that the Court would so casually discard its own role of assuring “the right of every individual to claim the protection of the laws” (Marbury v. Madison), in the name of protecting the principle of separation of powers.
Presidents Given Immunity From Suits

By Fred Barbash
Washington Post Staff Writer

A bitterly divided Supreme Court ruled yesterday that presidents may not be sued for monetary damages even if they break the law or violate citizens' constitutional rights.

The 5-to-4 decision, sought by former president Richard M. Nixon after being sued by one-time Pentagon cost analyst A. Ernest Fitzgerald, created an absolute presidential immunity from civil damages suits and, the majority said, from the inhibiting and time-consuming results of the thousands of such suits that could be brought against a chief executive.

The court refused to similarly shield top aides to the president, ruling in a complaint brought by Fitzgerald against Nixon aides Bryce N. Harlow and Alexander P. Butterfield.

Justice Byron R. White, writing the dissent on the Nixon ruling, called Justice Lewis F. Powell Jr.'s majority opinion on presidential immunity "tragic." It "is a reversion to the old notion that the king can do no wrong," he said. It "places the president above the law." Justices William J. Brennan Jr., Thurgood Marshall and Harry A. Blackmun joined White in dissent.

In the course of ruling on the two complaints yesterday, the court made another major change in laws designed to deter official misconduct: the justices, apparently in reaction to thousands of damages claims now swamping state, local and federal officials as well as police officers, gave judges new authority to weed out frivolous or insubstantial suits without requiring lengthy and costly trials.

Trials will be permitted only where a judge agrees that a "clearly established" breach of a law or constitutional right is involved, the court said in an 8-to-1 vote on Harlow vs. Fitzgerald.

Fitzgerald was the analyst with the Air Force who drew national attention as "the Pentagon whistle blower" when he testified before a Senate subcommittee in 1968 con-
COURT, From AI

As the Supreme Court yesterday extended to all official acts of the president the immunity granted by the court to top presidential aides ordinarily enjoy only that same "good faith" immunity that protects the other officials.

威慑 the president. above the outer perimeter of the presidency.

A. ERNEST FITZGERALD

calls immunity decision frightening

CHIEF JUSTICE WARREN E. BURGER dissented in Harlow v. Fitzgerald, saying that presidential aides should share presidential immunity, as Capitol Hill aides are sometimes allowed under court rulings to share legislative immunity.

Justice Brennan, Marshall, Blackmun, White and William H. Rehnquist joined in separate statements, but with John Paul Stevens and Sandra Day O'Connor, also agreed with Powell's majority opinion.

In Nixon v. Fitzgerald, the absolute-immunity decision, Blackmun, joined by Brennan and Marshall, wrote a dissent in addition to White's.

The court attempted unsuccessfully to reserve those two questions last year in Halperin's case. It resulted in a 4-4 split, when Rehnquist disqualified himself because he had been a member of the Nixon Justice Department. That case is still in the U.S. District Court in Washington awaiting yesterday's ruling for further action.

Some justices thought the issue should have been left unresolved again this term, because of an out-of-court settlement between Nixon and Fitzgerald.

Under that agreement Nixon agreed to pay $142,000 to Fitzgerald in exchange for the dropping of the suit. Nixon agreed to pay Fitzgerald another $28,000 should Fitzgerald win the immunity issue at the Supreme Court. Thus, no matter how the court ruled yesterday, there would be no trial of Nixon under the agreement.

Blackmun, with Brennan and Marshall, called this a "wager" yesterday, which, they said, made the case inappropriate for review.

Fitzgerald, who won a separate legal battle for reinstatement on June 15, said yesterday that he was not sure the court's immunity decision "ought to frighten anyone who loves liberty. If the king can do no wrong, we're in a lot of trouble." His suit against Harlow and Butterfield goes back to the District Court for further consideration.

Arthur Spitzer, an American Civil Liberties Union official here, said the decision "puts the president above the law."

A Nixon lawyer, R. Stan Mortensen, praised the ruling, saying that the presidency should have the same immunity enjoyed by the top officials in the other branches of government.

Elliot L. Richardson, representing Harlow and Butterfield, applauded the ruling in his client's case and said "public officials from local school board members to White House advisers and the public itself" should also applaud it.

Washington Post researcher Carin Pratt contributed to this article.

Presidents Get Immunity From Suits

WASHINGTON POST
A bitterly divided Supreme Court ruled yesterday that presidents may not be sued for monetary damages even if they break the law or violate citizens' constitutional rights.

The 5-to-4 decision, sought by former president Richard M. Nixon after being sued by one-time Pentagon cost analyst A. Ernest Fitzgerald, created an absolute presidential immunity from civil damages suits and, the majority said, from the inhibiting and time-consuming results of the thousands of such suits that would be brought against a chief executive.

The court refused to similarly shield top aides to the president, ruling in a complaint brought by Fitzgerald against Nixon aides Bryce N. Harlow and Alexander P. Butterfield. Justice Byron R. White, writing the dissent on the Nixon ruling, called Justice Lewis F. Powell Jr.'s majority opinion on presidential immunity "tragic." It "is a reversion to the old notion that the king can do no wrong," he said. It "places the president above the law." Justices William J. Brennan Jr., Thurgood Marshall and Harry A. Blackmun joined White in dissent.

In the course of ruling on the two complaints yesterday, the court made another major change in laws designed to deter official misconduct: the justices, apparently in reaction to thousands of damages claims now swamping state, local and federal officials as well as police officers, gave judges new authority to weed out frivolous or insubstantial suits without requiring lengthy and costly trials.

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Fitzgerald was the analyst with the Air Force who drew national attention as "the Pentagon whistle blower" when he testified before a Senate subcommittee in 1968 con-
Presidents Get Immunity From Suits

COURT, From A1

carring $2 billion in cost overruns and unexpected technical difficulties on the C5A transport plane.

The Nixon administration eliminated Fitzgerald's job in 1970, claiming his re-
moval was only part of an Air Force re-
organization. At a 1973 news conference, Nixon took personal credit for Fitzger-
ald's dismissal: "It was a decision that
was submitted to me," the president said
on Jan. 31, 1973: "I made it and I stick
by it."

Nixon later retracted the comment.
But Fitzgerald sued him for damages in
1978 for violating his free speech rights, adding the former president as a de-
fendant to the suit he had already brought
against the two Nixon White House aides he said participated in the decision, But-
terfield and Harlow.

The court has extended much less pro-
duction to all other public officials rang-
ing from Cabinet officers to police offi-
cers to dog catchers. They may not be
sued for actions taken in "good faith."

In ruling on the Harlow and Butter-
field case, the court said they and other
top presidential aides ordinarily enjoy
only that same "good faith" immunity that
protects the other officials.

Except in special circumstances, per-
haps involving foreign policy or national
security decisions and where they func-
tion as "alter egos" of the president, these
top-level White House assistants should
be treated like Cabinet members, Powell
said.

But in an important victory for these
sides and holders of public office every-
where, the court radically altered the de-
finition of "good faith." In the past, they
lost their protection if they acted "with
malicious intention" to break a law or
violate a citizen's rights. Powell said that
was too subjective and often resulted in
trials or lengthy and expensive fact-gath-
ering expeditions just to resolve the im-
munity issue.

Yesterday, the court said they could be
sued only when the law or constitutional
safeguard breached "was clearly estab-
lished at the time an action occurred."

If not, Powell said the judge should
dismiss the case without a trial. He said
this frees officials from harassment thro-
gough frivolous or insubstantial suits:
"The social costs include expenses of lit-
igation, the diversion of official energy
from pressing public issues, and the de-
terrence of able citizens from acceptance
of public office."

Chief Justice Warren E. Burger dis-
sented in Harlow v. Fitzgerald, saying
that presidential aides should share pres-
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are sometimes allowed under court rul-
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Washington Post researcher Carin
Pratt contributed to this article.
The President Would Be an Easily Identifiable Target for Suits

Excerpts from the majority opinion of Justice Lewis F. Powell Jr. in the case of Nixon vs. Fitzgerald.

Applying the principles of our cases to claims of this kind, we hold that petitioner, as a former president of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immunity a functionally mandated incident of the president's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history.

The president's unique status under the Constitution distinguishes him from other executive officials.

Because of the singular importance of the president's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. As is the case with prosecutors and judges—for whom absolute immunity is now established—a president must concern himself with matters likely to "arouse the most intense feelings." Yet, as our decisions have recognized, it is in precisely such cases that there exists the greatest public interest in providing an official "the maximum ability to deal fearlessly and impartially with" the duties of his office.

This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system. Nor can the sheer prominence of the president's office be ignored.

In view of the visibility of his office and the effect of his actions on countless people, the president would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a president from his public duties, to the detriment not only of the president and his office but also the nation that the presidency was designed to serve.

A rule of absolute immunity for the president will not leave the nation without sufficient protection against misconduct on the part of the chief executive. There remains the constitutional remedy of impeachment. In addition, there are formal and informal checks on presidential action that do not apply with equal force to other executive officials.

The president is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter presidential abuses of office, as well as to make credible the threat of impeachment.

Other incentives to avoid misconduct may include a desire to earn reelection, the need to maintain prestige as an element of presidential influence, and a president's traditional concern for his historical stature.

Excerpts from the dissent of Justice Byron R. White.

Attaching absolute immunity to the office of the president, rather than to particular activities that the president might perform, places the president above the law. It is a revision to the old notion that the king can do no wrong. Until now, this concept had survived in this country only in the form of sovereign immunity. That doctrine forecloses suit against the government itself and against government officials, but only when the suit against the latter actually seeks relief against the sovereign.

Suit against an office, however, may be maintained where it seeks specific relief against him for conduct contrary to his statutory authority or to the Constitution. Now, however, the court clothes the office of the president with sovereign immunity, placing it beyond the law.

The scope of immunity is determined by function, not office. The wholesale claim that the president is entitled to absolute immunity in all of his actions stands on no firmer ground than did the claim that all presidential communications are entitled to an absolute privilege, which was rejected in favor of a functional analysis, by an unanimous court in United States vs. Nixon, supra.

The majority may be correct in its conclusion that "a rule of absolute immunity will not leave the nation without sufficient remedies for misconduct on the part of the chief executive."

Such a rule will, however, leave Mr. Fitzgerald without an adequate remedy for the harms that he may have suffered. More importantly, it will leave future plaintiffs without a remedy, regardless of the substantiality of their claims.

The remedies in which the court finds comfort were never designed to afford relief for individual harms. Rather, they were designed as political safety-valves. Politics and history, however, are not the domain of the court; the courts exist to assure each individual that he, as an individual, has enforceable rights that he may pursue to achieve a peaceful redress of his legitimate grievances.

I find it ironic, as well as tragic, that the court would so casually discard its own role of assuring "the right of every individual to claim the protection of the laws," Marbury vs. Madison, in the name of protecting the principle of separation of powers. Accordingly, I dissent.
'The President Would Be an Easily Identifiable Target for Suits'

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A rule of absolute immunity for the president will not leave the nation without sufficient protection against misconduct on the part of the chief executive. There remains the constitutional remedy of impeachment. In addition, there are formal and informal checks on presidential action that do not apply with equal force to other executive officials.

The president is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter presidential abuses of office, as well as to make credible the threat of impeachment.

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The scope of immunity is determined by function, not office. The wholesale claim that the president is entitled to absolute immunity is predicated on his official acts. We find it ironic, as well as tragic, that the court would so casually discard its own role of assuring "the right of every individual to claim the protection of the laws," Marbury vs. Madison, in the name of protecting the principle of separation of powers. Accordingly, I dissent.
HIGH COURT HOLDS
PRESIDENT IMMUNE
FROM DAMAGE SUITS

5-4 RULING ON NIXON CASE

Companion Decision Upholds
'Qualified' Protection for
Chief Executive's Aides

By LINDA GREENHOUSE
Special to The New York Times
WASHINGTON, June 34 — The Supreme Court ruled 5 to 4 today that no President may be sued for damages for any official action he takes while in office.

Overturining a lower court ruling in a suit against former President Richard M. Nixon, the Court declared that "absolute Presidential immunity" is a "functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history."

In a companion ruling, the Court refused, 5 to 1, to accord the same absolute immunity to top Presidential aides. But the Justices effectively rewrote the law of "qualified immunity" that applies to most Federal and state officials, making it substantially more likely that courts will dismiss suits against such officials before trial.

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Excerpts from the ruling, page A12.

Court Bitterly Divided

Because officials covered by "qualified immunity" are sued much more often than the President, the companion ruling has more practical significance than the ruling on Presidential immunity.

But it was the decision on Presidential immunity that left the Court bitterly divided after almost seven months of grappling with the case. The ruling was on a damage suit by a former Air Force budget analyst, A. Ernest Fitzgerald, who charged that he had lost his job as a result of a White House conspiracy to deprive him of his civil rights. He was dismissed after exposing cost overruns in the C-5-A transport plane.

The rulings concerned only immunity from civil suits for damages, not from criminal prosecutions or from other types of judicial action. The majority made clear that it was not casting any doubt on the Court's 1974 ruling that required President Nixon to turn over the Watergate tapes. Today's ruling was based largely on what Associate Justice Lewis F. Powell Jr. called the "public

Continued on Page A13, Column 3
Associate Justice Louis F. Powell Jr. wrote the majority opinion.

But in ruling that Mr. Harlow and Mr. Butterfield were entitled only to the "qualified immunity," the Court has previously accorded to Cabinet officers, governors and other officials, the Justice's "qualified immunity" a new definition.

In the past, Justice Powell noted, an official claiming "qualified immunity" had to meet both an objective and a subjective test.

Objectively, the official had to prove that he did not know, or could not reasonably have been expected to know, that he had violated the plaintiff's legal or constitutional rights. Subjectively, he had also to prove that he had not acted "with malicious intent."

While the objective test can often be met by demonstrating that the law was unclear or the constitutional right undefined at the time of the events, it has been much harder for officials to prove their lack of malice.

Subjective Aspect Ended

The Court today abolished the subjective aspect of qualified immunity. Justice Powell said: "Government officials performing discretionary functions do not, as a matter of law, lose immunity for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which the reasonable person would have known."

In practical terms, the new definition means that officials who are sued will be much more likely to succeed in having suits dismissed on "summary judgment" before trial. Judges now refuse to grant summary judgment because the official's state of mind is an issue that typically has to be decided by a jury after conflicting evidence is heard. State of mind will no longer be an issue.

As a result of the ruling, President's immunity, in the case of Nixon v. Fitzgerald (No. 78-1738), Mr. Fitzgerald's lawsuit will be dismissed by the appeals court. In the second ruling, in the case of Harlow and Butterfield v. Fitzgerald (No. 80-945), the Supreme Court vacated the appeals court's ruling on qualified immunity and ordered it to take "further action consistent with this opinion."

Elliot L. Richardson, who represented the two officials in the Supreme Court, said today that he was "confident" that the suit against them would now be dismissed.
The Honorable Harry A. Blackmun  
Supreme Court of the United States  
c/o the Clerk of the Supreme Court  
of the United States  
One First Street, N. E.  
Washington, D. C. 20543  

Dear Justice Blackmun:

It has come to my attention that there is a factual error in the letter I sent to you on June 29, 1982. I stated in the first paragraph of that letter that I no longer represented Mr. Fitzgerald when the Petition for Writ of Certiorari was filed on Mr. Nixon's behalf in the Supreme Court. In fact, the Petition was filed on May 2, 1980, and I ceased representing Mr. Fitzgerald on July 20, 1981. I apologize for the error.

While this change makes no difference at all in terms of the points I was making in my letter, I did want to make certain that the letter was in all respects accurate.

Sincerely yours,

E. Barrett Prettyman, Jr.  
Suite 600  
815 Connecticut Avenue, N. W.  
Washington, D. C. 20006

cc: All Members of the Court  
Clerk of the Court
Memorandum to Justice Powell

Re: Nixon v. Fitzgerald, No. 79-1738; and Harlow and Butterfield v. Fitzgerald, No. 80-945

In the above cases I have prepared judgments pursuant to Rule 50.2 dealing with costs. There was only one joint appendix prepared by petitioners Harlow and Butterfield for use in both of the cases for a total cost of $26,649.57. I am concerned with the award of total costs against Mr. Fitzgerald. Certainly, in the Nixon case, which is a true reversal, Mr. Fitzgerald should bear the costs. In the Harlow, et al., case, while the opinion provides that the judgment of the Court of Appeals is vacated (The Court of Appeals apparently dismissed petitioners' appeal from the denial of their immunity defense), the Supreme Court has remanded the case so the District Court may reconsider respondent's pretrial showing, in connection with petitioners' motion for summary judgment. Hence, it does not truly appear that petitioners prevailed in this Court.

It might be more equitable to apportion the total printing cost so that Fitzgerald would pay costs in the Nixon case and split the cost with respect to the Harlow, et al., case for a total of two-thirds of the costs of printing the joint appendix. Petitioners Harlow and Butterfield would bear the additional one-third printing cost. I have prepared a proposed judgment that provides Harlow and Butterfield to recover $17,766.38 from Fitzgerald which would represent the printing cost of petitioner Nixon and one-half of the cost of printing in the Harlow, et al., case. I am also attaching a proposed judgment that awards total costs against Fitzgerald.

Respectfully submitted,

Alexander L. Stevas
Clerk

Attachments
To: Justice Powell  
From: David  
Re: Costs in Harlow and Nixon--## 80-945 and 79-1738

The cost of printing the joint appendix in these cases came to $26,949.57. There was only one joint appendix in the two cases.

Clerk Stevas proposes that Fitzgerald pick up 2/3 of the tab. He reasons that there were three defendants and that the cost of printing may be thought of as divided among the three. Fitzgerald clearly lost in Nixon and so he must pay Nixon's third. But Fitzgerald did not clearly lose in Harlow. The judgment below was vacated, and normally if the judgment below is vacated the winner below--Fitzgerald, here--pays the costs. Yet in this case Harlow and Butterfield were also losers: their claim of absolute immunity was rejected. Because of the uncertainty Clerk Stevas suggests that you split the difference between Harlow/Butterfield and Fitzgerald. Thus of the remaining two thirds of expense Fitzgerald would pay 1/3 and Harlow and Butterfield would make up the remaining third.

Clerks Stevas' recommendation is reasonable. I'm inclined to think, however, that even though the decision
below—an order of dismissal without opinion—was vacated, Harlow and Butterfield really did lose. They brought the matter here on an interlocutory appeal to establish absolute immunity for presidential advisers. I think that a fairer way to apportion costs would be to think of costs as divided in two between the two cases. Fitzgerald won one case and lost one. He should pay Nixon's half or $13,474.79.
July 12, 1982

Nos. 79-1738 and 80-945, Nixon and Harlow cases

Dear Byron,

In enclose copies of Al Stevas' letter of July 7 and of two drafts of proposed judgments: one that would impose the total $26,900.57 costs on Fitzgerald, and the other that would split the costs two-thirds to Fitzgerald and one third to Harlow and Butterfield.

Al recommends the latter (i.e. the division of the costs). I am inclined to agree with his recommendation. I doubt the fairness of imposing the total costs on Fitzgerald. He did not clearly lose in Harlow. The judgment below was vacated, and normally this would result in Fitzgerald paying the costs. Yet, Harlow and Butterfield failed in their claim of absolute immunity. They are better postured to prevail on the remand in view of the changed standard.

What do you think?

Sincerely,

Mr. Justice White
United States Supreme Court
1 First Street, N. E.
Washington, D. C. 20543
Supreme Court of the United States
Memorandum

11/14, 1982

Justice Douglas
Justice White is dead.
Today and will probably
be here all week.
And I'd heard he
doesn't know why he was
attacked. Jimmy
Re: 79-1738 and 80-945:
Nixon and Harlow cases

Dear Lewis,

Your recommendation on the division of costs in these cases is fine with me.

No big deal in Utah, but I've always disliked being blind-sided. Fred Graham was on the spot and helped subdue the aggressor. Fred apparently was protecting my First Amendment right to speak.

Best regards to Jo.

Sincerely yours,

Justice Powell
July 20, 1982

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

Dear Al,

Thank you for your letter of July 7, that finally reached me here in Richmond.

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

I have initialed and return the Orders to this effect.

Sincerely,

Enclosures:
Orders

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

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

djb