June 9, 1982

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

Dear Lewis:

The "closing crunch" is always bad and worse this year. But the pressures must not lead us into grave errors of constitutional dimensions. I cannot believe that Bill and Sandra like Note 27, for it significantly undermines the entire holding of this case. For the Court to make a constitutional holding and then give intimations that Congress -- under some circumstances -- could change it, does even more than undermine the immediate holding. It would inevitably add a new dimension to the now dormant drive in Congress to curtail the Court's jurisdiction. So far as I am concerned Congress can no more alter or modify the basic holding of this case than it can modify or overrule Marbury v. Madison, Brown v. Board of Education, or Nixon v. U.S.. Had the matter remained dormant I could have joined the opinion with a reservation that I did not agree with Footnote 27. But Harry's opinion flushed the point directly. We simply cannot have it both ways. Perhaps the next step is to have a session with the five who are in the majority and see if this can't be hammered out. I will make myself available at any time.

Regards,

Justice Powell
June 9, 1982

MEMORANDUM TO THE CONFERENCE

79-1738 Nixon v. Fitzgerald

If we are to continue the two year debate (happily outside of our opinions!), the Time magazine article confirms that, indeed, a President is not above the law. The Nixon Tapes Case and the imminent impeachment resolution, made this clear. I could find nothing in the Time review about private damage suit actions.

L.F.P., Jr.
June 9, 1982

PERSONAL

79-1738 Nixon v. Fitzgerald

Dear Chief:

You will not be surprised that your letter of this afternoon, requiring that we carry this case over, comes as more than a little disappointing - especially as it comes in the "closing crunch" of the Term.

But, of course, any member of this Court has this privilege, and I appreciate that you have reservations about the opinion - although it has been substantially in this form for some time.

In any event, I am agreeable to getting the five of us together to discuss your concern. I hope this can be done on Friday or Monday at the latest.

I assume that at Conference tomorrow you will say simply that you are not ready for Nixon and Harlow to come down.

Sincerely,

The Chief Justice

1fp/ss
JUSTICE WHITE, dissenting.

The four dissenting members of the Court in Butz v. Economou, 438 U. S. 478 (1978), argued that all federal officials are entitled to absolute immunity from suit for any action they take in connection with their official duties. That immunity would extend, even to actions taken with express knowledge that the conduct was clearly contrary to the controlling statute or clearly violative of the Constitution. Fortunately, the majority of the Court rejected that approach: We held that although public officials perform certain functions that entitle them to absolute immunity, the immunity attaches to particular functions—not to particular offices. Officials performing functions for which immunity is not absolute enjoy qualified immunity; they are liable in damages only if their conduct violated well-established law and if they should have realized that their conduct was illegal.

The Court now applies the dissenting view in Butz to the office of the President: A President acting within the outer boundaries of what Presidents normally do may, without liability, deliberately cause serious injury to any number of citizens even though he knows his conduct violates a statute or tramples on the constitutional rights of those who are injured. Even if the President in this case ordered Fitzgerald fired by means of a trumped-up reduction in force, knowing
that such a discharge was contrary to the civil service laws, he would be absolutely immune from suit. By the same token, if a President, without following the statutory procedures which he knows apply to himself as well as to other federal officials, orders his subordinates to wiretap or break into a home for the purpose of installing a listening device, and the officers comply with his request, the President would be absolutely immune from suit. He would be immune regardless of the damage he inflicts, regardless of how violative of the statute and of the Constitution he knew his conduct to be, and regardless of his purpose.¹

The Court intimates that its decision is grounded in the Constitution. If that is the case, Congress can not provide a remedy against presidential misconduct and that the criminal laws of the United States are wholly inapplicable to the President. I find this approach completely unacceptable. 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.

We have not taken such a scatter-gun approach in other cases. Butz held that absolute immunity did not attach to the office held by a member of the President's Cabinet but only to the specific functions performed by that officer for which absolute immunity is clearly essential. Members of Congress are absolutely immune under the Speech or Debate Clause of the Constitution, but the immunity extends only to their legislative acts. We have never held that in order for legislative work to be done, it is necessary to immunize all of the tasks that legislators must perform. Constitutional immunity does not extend to those many things that Senators and Representatives regularly and necessarily do that are not legislative acts. Members of Congress, for example, re-

¹This, of course, is not simply a hypothetical example. See Kissinger v. Halperin, aff'd by an equally divided Court, 452 U. S. 713 (1981).
peatedly importune the executive branch and administrative agencies outside hearing rooms and legislative halls, but they are not immune if in connection with such activity they deliberately violate the law. *United States v. Brewster*, 408 U. S. 501 (1972), for example, makes this clear. Neither is a Member of Congress or his aide immune from damage suits if in order to secure information deemed relevant to a legislative investigation, he breaks into a house and carries away records. *Gravel v. United States*, 408 U. S. 606 (1972). Judges are absolutely immune from liability for damages, but only when performing a judicial function, and even then they are subject to criminal liability. See *Dennis v. Sparks*, 449 U. S. 24, 31 (1980), *O'Shea v. Littleton*, 414 U. S. 488, 503 (1974). The absolute immunity of prosecutors is likewise limited to the prosecutorial function. A prosecutor who directs that an investigation be carried out in a way that is patently illegal is not immune.

In *Marbury v. Madison*, the Court, speaking through the Chief Justice, 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 that act.” 1 Cranch, 137, 165 (1803). 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 rever-
sion 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. *Larsen v. Domestic and Foreign Corp.*, 337 U.S. 682, 687 (1949). Suit against an officer, however, may be maintained where it seeks specific relief against him for conduct contrary to his statutory authority or to the Constitution. *Id.*, at 698. Now, however, the Court clothes the office of the President with sovereign immunity, placing it beyond the law.

In *Marbury v. Madison*, supra, at 163, the Chief Justice, speaking for the Court, observed that the “Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to observe this high appellation, if the laws furnish no remedy for the violation of a vested legal right.” Until now, the Court has consistently adhered to this proposition. In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), a unanimous Court held that the governor of a state was entitled only to a qualified immunity. We reached this position, even though we recognized that

“[i]n the case of higher officers of the executive branch—the inquiry is far more complex since the range of decisions and choices—whether the formulation of policy, of legislation, of budgets, or of day-to-day decisions—is virtually infinite—in short, since the options which the chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad.” *Id.*, at 246, 247.

As Justice Brennan observed in *McGautha v. California*, 402 U.S. 183, 252 (dissenting opinion), “The principle that our government shall be of laws and not of men is so
strongly woven into our constitutional fabric that it has found recognition in not just one but several provisions of the Constitution” (footnote omitted). And as THE CHIEF JUSTICE said in Complete Auto Transit, Inc. v. Reis, 451 U. S. 401, 429 (1981) (dissenting opinion):

“Accountability of each individual for individual conduct lies at the core of all law—indeed, of all organized societies. The trend to eliminate or modify sovereign immunity is not an unrelated development; we have moved away from ‘the king can do no wrong.’ The principle of individual accountability is fundamental if the structure of an organized society is not to be eroded to anarchy and impotence, and it remains essential in civil as well as criminal justice.”

Unfortunately, the Court now abandons basic principles that have been powerful guides to decision. It is particularly unfortunate since the judgment in this case has few, if any, indicia of a judicial decision; it is almost wholly a policy choice, a choice that is without substantial support and that in all events is ambiguous in its reach and import.

We have previously stated that “the law of privilege as a defense to damage actions against officers of government has ‘in large part been of judicial making.’” Butz v. Economou, 438 U. S. at 501–502 (1978), quoting Barr v. Mateo, 360 U. S. 564, 569 (1959). But this does not mean that the Court has simply “enacted” its own view of the best public policy. No doubt judicial convictions about public policy—whether and what kind of immunity is necessary or wise—have played a part, but the courts have been guided and constrained by common-law tradition, the relevant statutory background and our constitutional structure and history. Our cases dealing with the immunity of members of Congress are constructions of the Speech or Debate Clause and are guided by the history of such privileges at common law. The decisions dealing with the immunity of state officers involve the ques-
tion of whether and to what extent Congress intended to abolish the common law privileges by providing a remedy in the predecessor of 42 U. S. C. §1983 for constitutional violations by state officials. Our decisions respecting immunity for federal officials, including absolute immunity for judges, prosecutors and those officials doing similar work, also in large part reflect common law views, as well as judicial conclusions as to what privileges are necessary if particular functions are to be performed in the public interest.

Unfortunately, there is little of this approach in the Court's decision today. A footnote casually, but candidly, abandons the functional approach to immunity that has run through all of our decisions. Ante, at n. 34. Indeed, the majority turns this rule on its 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.

I

In declaring the President to be absolutely immune from suit for any deliberate and knowing violation of the Constitution or of a federal statute, the Court asserts that the immunity is "rooted in the constitutional tradition of the separation of powers and supported by our history". Ante, at 17. The decision thus has all the earmarks of a constitutional pronouncement—absolute immunity for the President's office is mandated by the Constitution. Although the Court appears to disclaim this, ante at n. 27, it is difficult to read the opinion coherently as standing for any narrower proposition: Attempts to subject the President to liability either by Congress through a statutory action or by the courts through a Bivens proceeding would violate the separation of powers.\footnote{Although the majority opinion initially claims that its conclusion is based substantially on "our history," historical analysis in fact plays virtually no part in the analysis that follows.}

\footnote{On this point, I am in agreement with the concurring memorandum of}
Such a generalized absolute immunity cannot be sustained when examined in the traditional manner and in light of the traditional judicial sources.

The petitioner and the Solicitor General, as amicus, rely principally on two arguments to support the claim of absolute immunity for the President from civil liability: absolute immunity is an "incidental power" of the Presidency, historically recognized as implicit in the Constitution, and absolute immunity is required by the separation of powers doctrine.

I will address each of these contentions.

A

The Speech or Debate Clause, Art. I, § 6, guarantees absolute immunity to members of Congress; nowhere, however, does the Constitution directly address the issue of presidential immunity. Petitioner nevertheless argues that the debates at the Constitutional Convention and the early history of constitutional interpretation demonstrate an implicit assumption of absolute presidential immunity. In support of this position, petitioner relies primarily on three separate items: First, preratification remarks made during the discussion of presidential impeachment at the Convention and in The Federalist; second, remarks made during the meeting of the first Senate; and third, the views of Justice Story.

The debate at the Convention on whether or not the President should be impeachable did touch on the potential dangers of subjecting the President to the control of another branch, the Legislature. Governor Morris, for example,

THE CHIEF JUSTICE.

4 The Solicitor General relies entirely upon the brief filed by his office in Kissinger v. Halperin, supra.

5 In fact, insofar as the Constitution addresses the issue of Presidential liability, its approach is very different from that taken in the Speech or Debate Clause. The possibility of impeachment assures that the President can be held accountable to the other branches of Government for his actions; the Constitution further states that impeachment does not bar criminal prosecution.

6 The debate is recorded in 2 M. Farrand, Records of the Federal Con-
complained of the potential for dependency and argued that "[the President] can do no criminal act without Coadjutors who may be punished. In case he should be re-elected, that will be sufficient proof of his innocence." Col. Mason responded to this by asking if "any man [shall] be above Justice" and argued that this was least appropriate for the man "who can commit the most extensive injustice." Madison agreed that "it [is] indispensable that some provision should be made for defending the Community against the incapacity, negligence or perjury of the chief Magistrate." Pinkney responded on the other side, believing that if granted the power, the Legislature would hold impeachment "as a rod over the Executive and by that means effectually destroy his independence."

Petitioner concludes from this that the delegates meant impeachment to be the exclusive means of holding the President personally responsible for his misdeeds, outside of electoral politics. This conclusion, however, is hardly supported by the debate. Although some of the delegates expressed concern over limiting presidential independence, the delegates voted eight to two in favor of impeachment. Whatever the fear of subjecting the President to the power of another branch, it was not sufficient, or at least not sufficiently shared, to insulate the President from political liability in the impeachment process.

Moreover, the Convention debate did not focus on wrongs the President might commit against individuals, but rather on whether there should be a method of holding him accountable for what might be termed wrongs against the state.

\[\text{vention of 1787, 64--69 (1934).}\]
\[\text{Id., at 64.}\]
\[\text{Id., at 65.}\]
\[\text{Id. at 66.}\]
\[\text{In Federalist No. 65, Hamilton described impeachable offenses as follows: "They are of a nature which may with peculiar propriety be denomi-}\]
Thus, examples of the abuses that concerned delegates were betrayal, oppression, and bribery; the delegates feared that the alternative to an impeachment mechanism would be “tumults and insurrections” by the people in response to such abuses. The only conclusions that can be drawn from this debate are that the independence of the Executive was not understood to require a total lack of accountability to the other branches and that there was no general desire to insulate the President from the consequences of his improper acts.\textsuperscript{12}

Much the same can be said in response to petitioner’s reliance on \textit{The Federalist} No. 77. In that essay, Hamilton asked whether the presidency combines “the requisites to safety in the republican sense—a due dependence on the people—a due responsibility.” He answered that the constitutional plan met this test because it subjected the President to both the electoral process and the possibility of impeachment, including subsequent criminal prosecution. Petitioner concludes from this that these were intended to be the exclusive means of restraining presidential abuses. This, by no means follows. Hamilton was concerned in \textit{Federalist} No. 77, as were the delegates at the Convention, with the larger political abuses,—“wrongs against the state”—that a President

\textsuperscript{12}The majority’s use of the historical record is in line with its other arguments: It puts the burden on respondent to demonstrate no presidential immunity, rather than on petitioner to prove the appropriateness of this defense. Thus, while noting that the doubts of some of the Framers were not sufficient to prevent the adoption of the Impeachment Clause, the majority nevertheless states that “nothing in [the] debates suggests an expectation that the President would be subjected to [civil damages actions].” \textit{Ante}, at n. 31. Of course, nothing in the debates suggests an expectation that the President would not be liable in civil suits for damages either. Nevertheless, the debates are one element that the majority cites to support its conclusion that “[t]he best historical evidence clearly supports the Presidential immunity we have upheld.” \textit{Ante}, at n. 31.
might commit. He did not consider what legal means might be available for redress of individualized grievances.\(^{13}\)

That omission should not be taken to imply exclusion in these circumstances is well illustrated by comparing some of the remarks made in the state ratifying conventions with Hamilton’s discussion in No. 77. In the North Carolina ratifying convention, for example, there was a discussion of the adequacy of the impeachment mechanism for holding executive officers accountable for their misdeeds. Governor Johnson defended the constitutional plan by distinguishing three legal mechanisms of accountability:

“If an officer commits an offence against an individual, he is amenable to the courts of law. If he commits crimes against the state, he may be indicted and punished. Impeachment only extends to high crimes and misdemeanors in a public office. It is a mode of trial pointed out for great misdemeanors against the public.”\(^{14}\)

Governor Johnson surely did not contemplate that the availability of an impeachment mechanism necessarily implied the exclusion of other forms of legal accountability; rather, the method of accountability was to be a function of the character of the wrong. Mr. Maclaine, another delegate to the North Carolina Convention, clearly believed that the courts would

\(^{13}\) Other commentary on the proposed Constitution did, however, consider the subject of presidential immunity. In fact, the subject was discussed in the first major defense of the Constitution published in the United States. In his essays on the Constitution, published in the Independent Gazetteer in September 1787, Tench Coxe included the following statement in his description of the limited power of the proposed office of the President: “His person is not so much protected as that of a member of the House of Representatives; for he may be proceeded against like any other man in the ordinary course of law.” Quoted in II The Documentary History of the Ratification of the Constitution 141 (1976) (emphasis in original).

\(^{14}\) 4 Elliot’s Debates on the Federal Constitution, at 43.
remain open to individual citizens seeking redress from injuries caused by presidential acts:

"The President is the superior officer, who is to see the laws put in execution. He is amenable for any maladministration in his office. Were it possible to suppose that the President should give wrong instructions to his deputies, whereby the citizens would be distressed, they would have redress in the ordinary courts of common law." 13

A similar distinction between different possible forms of presidential accountability was drawn by Mr. Wilson at the Pennsylvania ratifying convention:

"[The President] is placed high, and is possessed of power far from being contemptible; yet not a single privilege is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment." 16

There is no more reason to respect the views of Hamilton than those of Wilson: both were members of the constitutional convention; both were instrumental in securing the ratification of the Constitution. But more importantly, there is simply no express contradiction in their statements. Petitioner relies on an inference drawn from silence to create this contradiction. The surrounding history simply does not support this inference.

The second piece of historical evidence cited by petitioner is an exchange at the first meeting of the Senate, involving Vice-President Adams and Senators Ellsworth and MacClay. The debate started over whether or not the words "the Presi-

13 Id., at 47.
16 2 Elliot 480.
dent” should be included at the beginning of Federal writs, similar to the manner in which English writs ran in the King’s name. Senator MacClay thought that this would improperly combine the executive and judicial branches. This, in turn, led to a discussion of the proper relation between the two. Senator Ellsworth and Vice-President Adams defended the proposition that

“the President, personally, was not subject to any process whatever; could have no action, whatever, brought against him; was above the power of judges, justices, &c. For [that] would put it in the power of a common justice to exercise any authority over him, and stop the whole machine of government.” 17

In their view the impeachment process was the exclusive form of process available against the President. Senator MacClay ardently opposed this view and put the case of a President committing “murder in the street.” In his view, in such a case neither impeachment nor resurrection were the exclusive means of holding the President to the law; rather, there was “loyal justice.” Senator MacClay, who recorded the exchange, concludes his notes with the remark that none of this “is worth minuting, but it shows clearly how amazingly fond of the old leaven many people are.” 18 In his view, Senator Ellsworth and his supporters had not fully comprehended the difference in the political position of the American President and that of the British monarch. Again, nothing more can be concluded from this than that the proper scope of presidential accountability, including the question whether the President should be subject to judicial process, was no clearer then than it is now.

The final item cited by petitioner clearly supports his position, but is of such late date that it contributes little to under-

18 Ibid.
standing the original intent. In his Commentaries on the Constitution, published in 1833, Justice Story described the "incidental powers" of the President:

"Among these must necessarily be included the power to perform [his functions] without any obstruction or impediment whatsoever. The President cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability. In the exercise of his political powers he is to use his own discretion, and he is accountable only to his country and to his own conscience. His decision in relation to these powers is subject to no control, and his discretion, when exercised, is conclusive." 19

While Justice Story may have been firmly committed to this view in 1833, Senator Pinckney, a delegate to the Convention, was as firmly committed to the opposite view in 1800. 20

Senator Pinckney, arguing on the floor of the Senate, contrasted the privileges extended to members of Congress by the Constitution with the lack of any such privileges extended to the President. 21 He argued that this was a delib-

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19 2 J. Story, Commentaries on the Constitution 372 (1873).
20 It is not possible to determine whether this is the same Pinckney that Madison recorded as Pinkney, who objected at the Convention to granting a power of impeachment to the Legislature. Two Charles Pinckneys attended the Convention. Both were from South Carolina. See 3 M. Farrand, supra, at 559.
21 Senator Pinckney's comments are recorded at 10 Annals of Congress 69-83. Petitioner contends that these remarks are not relevant because they concerned only the authority of Congress to inquire into the origin of an allegedly libelous newspaper article. Reply Brief for Petitioner, at 7. Although this was the occasion for the remarks, Pinckney did discuss the immunity of members of Congress as a privilege embodied in the Speech or Debate Clause: "our Constitution supposes no man . . . to be infallible, but considers them all as mere men, to be subject to all the passions and frail-
erate choice of the delegates to the Convention, who "well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here." Therefore, "[n]o privilege of this kind was intended for your Executive, nor any except that ... for your Legislature." 22

In previous immunity cases the Court has emphasized the

ties, and crimes, that men generally are, and accordingly provides for the trial of such as ought to be tried, and leaves the members of the Legislature, for their proceedings, to be amenable to their constituents and to public opinion. . . . " This, then, was one of the privileges of Congress that he was contrasting with those extended (or not extended) to the President.

"The majority cites one additional piece of historical evidence, a letter by President Jefferson, which it contends demonstrates "that Jefferson believed the President not to be subject to judicial process." Ante, at n. 31.

Thomas Jefferson's views on the relation of the President to the judicial process are, however, not quite so clear as the majority suggests. Jefferson took a variety of positions on the proper relation of executive and judicial authority, at different points in his career. It would be surprising if President Jefferson had not argued strongly for such immunity from judicial process, particularly in a confrontation with Chief Justice Marshall. Jefferson's views on this issue before he became President would be of a good deal more significance. In this regard, it is significant that in Jefferson's second and third drafts of the Virginia Constitution, which also proposed a separation of the powers of government into three separate branches, he specifically proposed that the Executive be subject to judicial process: "he shall be liable to action, tho' not to personal restraint for private duties or wrongs." 1 Papers of Thomas Jefferson 350, 360. Also significant is the fact that when Jefferson's followers tried to impeach Justice Chase in 1804-1805, one of the grounds of their attack on him was that he had refused to subpoena President Adams during the trial of Dr. Cooper for sedition. See Corwin, "The President: Office and Powers" 113. Finally, it is worth noting that even in the middle of the debate over Chief Justice Marshall's power to subpoena the President during the Burr trial, Jefferson looked to a legislative solution of the confrontation: "I hope however that . . . at the ensuing session of the legislature (the Chief Justice) may have means provided for giving to individuals the benefit of the testimony of the [Executive] functionaries in proper cases." X Works of Thomas Jefferson, 407 n. (P. Ford Ed. 1905) (quoting a letter from President Jefferson to George Hay, United States District Attorney for Virginia).
importance of the immunity afforded the particular govern­
ment official at common law. See Imbler v. Pachtman, 424
U. S. 409, 421 (1976). Clearly this sort of analysis is not pos­
sible when dealing with an office, the presidency, that did not
exist at common law. To the extent that historical inquiry is
appropriate in this context, it is constitutional history, not
common law, that is relevant. From the history discussed
above, however, all that can be concluded is that absolute im­
munity from civil liability for the President finds no support
in constitutional text or history, or in the explanations of the
earliest commentators. This is too weak a ground to support
a declaration by this Court that the President is absolutely
immune from civil liability, regardless of the source of liabil­
ity or the injury for which redress is sought. This much the
majority implicitly concedes since history and text, tradi­
tional sources of judicial argument, merit only a footnote in
the Court’s opinion. Ante, at n. 31.

B

No bright line can be drawn between arguments for abso­
lute immunity based on the constitutional principle of separa­
tion of powers and arguments based on what the Court refers
to as “public policy.” This necessarily follows from the
Court’s functional interpretation of the separation of powers
doctrine:

“[I]n determining whether the Act disrupts the proper
balance between the coordinate branches, the proper in­
quiry focuses on the extent to which it prevents the Ex­
ecutive Branch from accomplishing its constitutionally
assigned functions.” Nixon v. Administrator of Gen­

See also United States v. Nixon, 418 U. S. 683, 706-707
(1974); Youngstown Sheet & Tube Co. v. Sawyer, 579, 635
(1952) (Jackson, J., concurring). Petitioner argues that pub­
lic policy favors absolute immunity because absent such im­
munity the President’s ability to execute hisconstitutionally
mandated obligations will be impaired. The convergence of these two lines of argument is superficially apparent from the very fact that in both instances the approach of the Court has been characterized as a "functional" analysis.

The difference is only one of degree. While absolute immunity might maximize executive efficiency and therefore be a worthwhile policy, lack of such immunity may not so disrupt the functioning of the presidency as to violate the separation of powers doctrine. Insofar as liability in this case is of congressional origin, petitioner must demonstrate that subjecting the President to a private damages action will prevent him from "accomplishing [his] constitutionally assigned functions." Insofar as liability is based on a *Bivens* action, perhaps a lower standard of functional disruption is appropriate. Petitioner has surely not met the former burden; I do not believe that he has met the latter standard either.

Taken at face value, the Court's position that as a matter of constitutional law the President is absolutely immune should mean that he is immune not only from damages actions but also from suits for injunctive relief, criminal prosecutions and, indeed, from any kind of judicial process. But there is no contention that the President is immune from criminal prosecution in the courts under the criminal laws enacted by Congress or by the states for that matter. Nor would such a claim be credible. The Constitution itself provides that impeachment shall not bar "Indictment, Trial, Judgment, and Punishment, according to Law." Article I, Section II, Clause VII. Similarly, our cases indicate that immunity from damages actions carries no protection from criminal prosecution. *Supra,* at 3.

Neither can there be a serious claim that the separation of powers doctrine insulates presidential action from judicial review or insulates the President from judicial process. No argument is made here that the President, whatever his liability for money damages, is not subject to the courts' injunctive powers. See, e. g., *Youngstown Sheet & Tube Co.,* supra;
Korematsu v. United States, 323 U.S. 214 (1944); Panama Refining Co. v. Ryan, 293 U.S. 38 (1935). Petitioner's attempt to draw an analogy to the Speech or Debate Clause, Brief, at 45, one purpose of which is "to prevent accountability before a possibly hostile judiciary," Gravel v. United States, 408 U.S. 606, 617 (1972), breaks down at just this point. While the Speech or Debate Clause guarantees that "for any Speech or Debate" congressmen "shall not be questioned in any other Place," and, thus, assures that congressmen, in their official capacity, shall not be the subject of the courts' injunctive powers, no such protection is afforded the Executive. Indeed, as the cases cited above indicate, it is the rule, not the exception, that executive actions—including those taken at the immediate direction of the President—are subject to judicial review. Regardless of the possibility of money damages against the President, then, the constitutionality of the President's actions or their legality under the applicable statutes can and will be subject to review. Indeed, in this very case, respondent Fitzgerald's dismissal was set aside by the Civil Service Commission as contrary to the applicable regulations issued pursuant to authority granted by Congress.

Nor can private damages actions be distinguished on the ground that such claims would involve the President personally in the litigation in a way not necessitated by suits seeking declaratory or injunctive relief against certain presidential actions. The President has been held to be subject to judicial process at least since 1807. Aaron Burr case, 25 Fed. Cas. 30 (1867) (Chief Justice Marshall, sitting as circuit justice). Burr "squarely ruled that a subpoena may be directed

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"The Solicitor General, in fact, argues that the possibility of judicial review of presidential actions supports the claim of absolute immunity: Judicial review "serves to contain and correct the unauthorized exercise of the President's power," making private damages actions unnecessary in order to achieve the same end. Brief, at 31 (see n. 3)."
to the President." *Nixon v. Sirica*, 487 F. 2d 700, 709 (DC Cir. 1973). Chief Justice Marshall flatly rejected any suggestion that all judicial process, in and of itself, constitutes an unwarranted interference in the Presidency:

"The guard, furnished to this high officer, to protect him from being harassed by *vexatious* and *unnecessary* subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstance which is to precede their being issued." 25 Fed. Cas., at 34.

This position was recently rearticulated by the Court in *United States v. Nixon*, 418 U. S. 683, 706 (1974):

"Neither the doctrine of separation of powers, nor the need for confidentiality . . . without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances."

These two lines of cases establish then that neither subjecting presidential actions to a judicial determination of their constitutionality, nor subjecting the President to judicial process violates the separation of powers doctrine. Similarly, neither has been held to be sufficiently intrusive to justify a judicially declared rule of immunity. With respect to intrusion by the judicial process itself on Executive functions, subjecting the President to private claims for money damages involves no more than this. If there is a separation of powers problem here, it must be found in the nature of the remedy and not in the process involved.

We said in *Butz v. Economou*, 438 U. S. 478 (1978), that "it is not unfair to hold liable the official who knows or should know he is acting outside the law, and . . . insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Id.* at 506-507. Today's decision in *Harlow v. Fitzgerald*, No. 80-945, makes clear that the President, were he subject to
civil liability, could be held liable only for an action that he knew, or as an objective matter should have known, was illegal and a clear abuse of his authority and power. In such circumstances, the question that must be answered is who should bear the cost of the resulting injury—the wrongdoer or the victim.

The principle that should guide the Court in deciding this question was stated long ago by Chief Justice Marshall: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 1 Cranch 137, 163 (1803). Much more recently, the Court considered the role of a damages remedy in the performance of the courts' traditional function of enforcing federally guaranteed rights: "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 395 (1971). To the extent that the Court denies an otherwise appropriate remedy, it denies the victim the right to be made whole and, therefore, denies him "the protection of the laws." 25

That the President should have the same remedial obligations toward those whom he injures as any other federal officer is not a surprising proposition. The fairness of the reme-

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25 Contrary to the suggestion of the majority, ante, at n. 38, I do not suggest that there must always be a remedy in civil damages for every legal wrong or that *Marbury v. Madison* stands for this proposition. *Marbury* does, however, suggest the importance of the private interests at stake within the broader perspective of a political system based on the rule of law. The functional approach to immunity questions, which we have previously followed but which the majority today discards, represented an appropriate reconciliation of the conflicting interests at stake.
dial principle the Court has so far followed—that the wrongdoer, not the victim, should ordinarily bear the costs of the injury—has been found to be outweighed only in instances where potential liability is "thought to injure the governmental decisionmaking process." *Imbler v. Pachtman*, 424 U. S. 409, 437 (1976) (WHITE, J., concurring). The argument for immunity is that the possibility of a damages action will, or at least should, have an effect on the performance of official responsibilities. That effect should be to deter unconstitutional, or otherwise illegal, behavior. This may, however, lead officers to be more careful and "less vigorous" in the performance of their duties. Caution, of course, is not always a virtue and undue caution is to be avoided.

The possibility of liability may, in some circumstances, distract officials from the performance of their duties and influence the performance of those duties in ways adverse to the public interest. But when this "public policy" argument in favor of absolute immunity is cast in these broad terms, it applies to all officers, both state and federal: All officers should perform their responsibilities without regard to those personal interests threatened by the possibility of a lawsuit. See *Imbler*, supra, at 436 (1976) (WHITE, J., concurring).26 Inevitably, this reduces the public policy argument to nothing more than an expression of judicial inclination as to which officers should be encouraged to perform their functions with "vigor," although with less care.27

The Court's response, until today, to this problem has been to apply the argument to individual functions, not offices, and
to evaluate the effect of liability on governmental decision-making within that function, in light of the substantive ends that are to be encouraged or discouraged. In this case, therefore, the Court should examine the functions implicated by the causes of action at issue here and the effect of potential liability on the performance of those functions.

II

The functional approach to the separation of powers doctrine and the Court's more recent immunity decisions converge on the following principle: 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 a unanimous Court in United States v. Nixon, supra. Therefore, whatever may be true of the necessity of such a broad immunity in certain areas of executive responsibility, the only question that must be answered here is whether the dismissal of employees falls within a constitutionally assigned executive function, the performance of which would be substantially impaired by the possibility of a private action for damages. I believe it does not.

Respondent has so far proceeded in this action on the basis of three separate causes of action: two federal statutes—5 U. S. C. § 7211 and 18 U. S. C. § 1505—and the First Amendment. At this point in the litigation, the availability of these causes of action is not before us. Assuming the correctness of the the lower court's determination that the two

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*See Supreme Court of Virginia v. Consumers Union of the United States, 446 U. S. 719 (1980); Butz, supra, at 511.

*I will not speculate on the presidential functions which may require absolute immunity, but a clear example would be instances in which the President participates in prosecutorial decisions.
federal statutes create a private right of action, I find the suggestion that the President is immune from those causes of action to be unconvincing. The attempt to found such immunity upon a separation of powers argument is particularly unconvincing.

The first of these statutes, 5 U. S. C. §7211, states that "[t]he right of employees . . . to . . . furnish information to either House of Congress, or to a committee or a Member thereof, may not be interfered with or denied." The second, 18 U. S. C. §1505, makes it a crime to obstruct congressional testimony. It does not take much insight to see that at least one purpose of these statutes is to assure congressional access to information in the possession of the Executive Branch, which Congress believes it requires in order to carry out its responsibilities.30 Insofar as these statutes implicate a separation of powers argument, I would think it to be just the opposite of that suggested by petitioner and accepted by the majority. In enacting these statutes, Congress sought to preserve its own constitutionally mandated functions in the face of a recalcitrant Executive.31 Thus, the separation

30 See, e.g., 48 Cong. Rec. 4653 (1912) ("During my first session of Congress I was desirous of learning the needs of the postal service and inquiring into the conditions of the employees. To my surprise I found that under an Executive order these civil service employees could not give me any information.") (remarks of Rep. Calder); id., at 4656 ("I believe it is high time that Congress should listen to the appeals of these men and provide a way whereby they can properly present a petition to the Members of Congress for a redress of grievances without the fear of losing their official positions") (remarks of Rep. Reilly); id., at 5157 ("I have always requested employees to consult with me on matters affecting their interest and believe that it is my duty to listen to all respectful appeals and complaints.") (remarks of Rep. Evans). Indeed, it is for just this reason that petitioners in No. 89-945 argue that the statutes do not create a private right of action: "5 U. S. C. §7211 and 18 U. S. C. §1505 were designed to protect the legislative process, not to give one such as Fitzgerald a right to seek damages." Brief for petitioners, at 26, n. 11.

31 Indeed, the impetus for passage of what is now 5 U. S. C. §7211 was
of powers problem addressed by these statutes was first of all presidential behavior that intruded upon, or burdened, Congress' performance of its own constitutional responsibilities. It is no response to this to say that such a cause of action would disrupt the President in the furtherance of his responsibilities. That approach ignores the separation of powers problem that lies behind the congressional action; it assumes that presidential functions are to be valued over congressional functions.

The argument that by providing a damages action under these statutes (as is assumed in this case) Congress has adopted an unconstitutional means of furthering its ends, must rest on the premise that presidential control of executive employment decisions is a constitutionally assigned presidential function with which Congress may not significantly interfere. This is a frivolous contention. In United States v. Perkins, 116 U. S. 483, 485 (1886), this Court held that "when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest." Whatever the rule may be with respect to high officers, see Humphrey's Executor v. United States, 295 U. S. 602 (1935), with respect to those who fill traditional bureaucratic positions, restrictions on executive authority are the rule and not the exception.

This case itself demonstrates, the severe statutory restraints under which the President operates in this area. Fitzgerald was a civil service employee working in the Office of the Secretary of the Air Force. Although his position

the imposition of "gag rules" upon testimony of civil servants before congressional committees. See Exec. Order No. 402 (Jan. 25, 1906); Exec. Order No. 1142 (Nov. 26, 1909).

"Thus, adverse action may generally be taken against civil servants only "for such cause as will promote the efficiency of the service." 5 U. S. C. §§ 7306, 7313 and 7348.
was such as to fall within the "excepted" service, which would ordinarily mean that Civil Service rules and regulations applicable to removals would not protect him, 5 CFR Part 6, § 6.4, his status as a veteran entitled him to special protections. Veterans are entitled to certain Civil Service benefits afforded to "preference eligibles," 5 U. S. C. § 2106. These benefits include that set forth in 5 U. S. C. § 7513(a): "An agency may take [adverse action] against an employee only for such cause as will promote the efficiency of the service." Similarly, his veteran status entitled Fitzgerald to the protection of the reduction in force procedures established by civil service regulation. 5 U. S. C. §§ 3501-3502. It was precisely those procedures that the Chief Examiner for the Civil Service Commission found had been violated, in his 1973 recommendation that respondent be reappointed to his old position or to a job of comparable authority.

This brief review is enough to illustrate my point: Personnel decisions of the sort involved in this case are emphatically not a constitutionally assigned presidential function that will tolerate no interference by either of the other two branches of government. More important than this "quantitative" analysis of the degree of intrusion in presidential decision-making permitted in this area, however, is the "qualitative" analysis suggested in § I(B) above.

Absolute immunity is appropriate when the threat of liability may bias the decisionmaker in ways that are adverse to the public interest. But as the various regulations and statutes protecting civil servants from arbitrary executive action illustrate, this is an area in which the public interest is demonstrably on the side of encouraging less "vigor" and more "caution" on the part of decisionmakers. That is, the very steps that Congress has taken to assure that executive employees will be able freely to testify in Congress and to assure that they will not be subject to arbitrary adverse actions indicate that those policy arguments that have elsewhere justi-
fled absolute immunity are not applicable here. Absolute immunity would be nothing more than a judicial declaration of policy that directly contradicts the policy of protecting civil servants reflected in the statutes and regulations.

If respondent could, in fact, have proceeded on his two statutory claims, the Bivens action would be superfluous. Respondent may not collect damages twice, and the same injuries are put forward by respondent as the basis for both the statutory and constitutional claims. As we have said before, "were Congress to create equally effective alternative remedies, the need for damages relief [directly under the Constitution] might be obviated." Davis v. Passman, 442 U. S. 228, 248 (1979). Nevertheless, because the majority decides that the President is absolutely immune from a Bivens action as well, I shall express by disagreement with that conclusion.

In Bivens v. Six Unknown Federal Narcotics Agents, 403 U. S. 388 (1971), we held that individuals who have suffered a compensable injury through a violation of the rights guaranteed them by the Fourth Amendment may invoke the general federal-question jurisdiction of the federal courts in a suit for damages. That conclusion rested on two principles: First, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws," 403 U. S., at 397, quoting Marbury v. Madison, 1 Cranch 137, 163 (1803); second, "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." 403 U. S., at 395. In Butz v. Economou, 438 U. S. 478 (1977), we rejected the argument of the federal government that federal officers, including cabinet officers, are absolutely immune from civil liability for such constitutional violations—a position that we recognized would substantially undercut our conclusion in Bivens. We held there that although the performance of certain limited functions will be protected by the shield of absolute immunity, the general rule is that federal officers, like state officers, have only a qualified immunity. Finally, in Davis v.
Passman, 442 U. S. 228 (1979), we held that a Congressman could be held liable for damages in a *Bivens*-type suit brought in federal court alleging a violation of individual rights guaranteed the plaintiff by the Due Process Clause. In my view, these cases have largely settled the issues raised by the *Bivens* aspect of this case.

These cases established the following principles. First, it is not the exclusive prerogative of the legislative branch to create a federal cause of action for a constitutional violation. In the absence of adequate legislatively prescribed remedies, the general federal-question jurisdiction of the federal courts permits the courts to create remedies, both legal and equitable, appropriate to the character of the injury. Second, exercise of this "judicial" function does not create a separation of powers problem: We have held both executive and legislative officers subject to this judicially created cause of action and in each instance we have rejected separation of powers arguments. Holding federal officers liable for damages for constitutional injuries no more violates separation of powers principles than do the equitable remedies that result from the traditional function of judicial review. Third, federal officials will generally have a "qualified immunity" from such suits; absolute immunity will be extended to certain functions only on the basis of a showing that exposure to liability is inconsistent with the proper performance of the official's duties and responsibilities. Finally, Congress retains the power to restrict exposure to liability, and the policy judgments implicit in this decision should properly be made by Congress.

The majority fails to recognize the force of what the Court has already done in this area. Under the above principles, the President could not claim that there are no circumstances under which he would be subject to a *Bivens*-type action for violating respondent's constitutional rights. Rather, he must assert that the absence of absolute immunity will substantially impair his ability to carry out particular functions that are his constitutional responsibility. For the reasons I
have presented above, I do not believe that this argument can be successfully made under the circumstances of this case.

It is, of course, theoretically possible, that the President should be held to be absolutely immune because each of the functions for which he has constitutional responsibility would be substantially impaired by the possibility of civil liability. I do not think this argument is valid for the simple reason that the function involved here does not have this character. Which side of the line other presidential functions would fall on need not be decided in this case.

The majority opinion suggests a variant of this argument. It argues, not that every presidential function has this character, but that distinguishing the particular functions involved in any given case would be "difficult." *Ante,* at n. 34. Even if this were true, it would not necessarily follow that the President is entitled to absolute immunity: That would still depend on whether, in those unclear instances, it is likely to be the case that one of the functions implicated deserves the protection of absolute immunity. In this particular case, I see no such function.

"The majority also seems to believe that by "function" the Court has in the past referred to "subjective purpose." See *ante,* at n. 34 ("judges frequently would need to inquire into the purpose for which acts were taken."). I do not read our cases that way. In *Stump v. Sparkman,* 435 U. S. 349, 362 (1978), we held that the factors determining whether a judge's act was a "judicial action" entitled to absolute immunity "relate to the nature of the act itself, i. e., whether it is a function normally performed by a judge, and to the expectations of the parties." Neither of these factors required any analysis of the purpose the judge may have had in carrying out the particular action. Similarly in *Butz v. Economou,* 438 U. S. 478, 512-516 (1977), when we determined that certain executive functions were entitled to absolute immunity because they shared "enough of the characteristics of the judicial process," we looked to objective qualities and not subjective purpose.

"The majority seems to suggest that responsibility for governmental reorganizations is one such function. *Ante,* at n. 34. I fail to see why this
I do not believe that subjecting the President to a Bivens action would create separation of powers problems or "public policy" problems different from those involved in subjecting the President to a statutory cause of action. Relying upon the history and text of the Constitution, as well as the analytic method of our prior cases, I conclude that these problems are not sufficient to justify absolute immunity for the President in general, nor under the circumstances of this case in particular.

III

Because of the importance of this case, it is appropriate to examine the reasoning of the majority opinion. The opinion suffers from serious ambiguity even with respect to the most fundamental point: How broad is the immunity granted the President? The opinion suggests that its scope is limited by the fact that under none of the asserted causes of action "has Congress taken express legislative action to subject the President to civil liability for his official acts." Ante, at 16. We are never told, however, how or why Congressional action could make a difference. It is not apparent that any of the propositions relied upon by the majority to immunize the President would not apply equally to such a statutory cause of action; nor does the majority indicate what new principles would operate to undercut those propositions.

In the end, the majority seems to overcome its initial hesitancy, for it announces that, "[w]e consider [absolute] 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," ante, at should be so.

*Although our conclusions differ, the majority opinion reflects a similar view as to the relationship between the two sources of the causes of action in this case: It does not believe it necessary to differentiate in its own analysis between the statutory and constitutional causes of action.
16–17. See also ante, at 24 ("A rule of absolute immunity for the President will not leave the Nation without sufficient remedies for misconduct on the part of the chief executive."). While the majority opinion recognizes that "[i]t is settled law that the separation of powers doctrine does not bar every exercise of jurisdiction over the President of the United States," it bases its conclusion, at least in part, on a suggestion that there is a special jurisprudence of the presidency. Ante, at 22.

But in United States v. Nixon, 418 U. S. 683 (1974), we upheld the power of a federal district court to issue a subpoena duces tecum against the President. In other cases we have enjoined executive officials from carrying out presidential

"THE CHIEF JUSTICE leaves no doubt that he, at least, reads the majority opinion as standing for the broad proposition that the President is absolutely immune under the Constitution:"

"I write separately to underscore that the presidential immunity spelled out today derives from and is mandated by the constitutional doctrine of separation of powers." Concurring opinion of THE CHIEF JUSTICE, ante, at 1.

"Contrary to the suggestion of the majority, Mississippi v. Johnson, 71 U. S. 475 (1866), carefully reserved the question of whether a court may compel the President himself to perform ministerial executive functions:

"We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader issues . . . whether, in any case, the President . . . may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime."

Similarly, Kendall v. United States, 12 Pet. 524 (1838), also cited by the majority, did not indicate that the President could never be subject to judicial process. In fact, it implied just the contrary in rejecting the argument that the mandamus sought involved an unconstitutional judicial infringement upon the Executive Branch:

"The mandamus does not seek to direct or control the postmaster general in the discharge of any official duty, partaking in any respect of an executive character; but to enforce the performance of a mere ministerial act, which neither he nor the president had any authority to deny or control." Id., at 610.
directives. See e. g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579 (1952). Not until this case has there ever been a suggestion that the mere formalism of the name appearing on the complaint was more important in resolving separation of powers problems than the substantive character of the judicial intrusion upon executive functions.

The majority suggests that the separation of powers doctrine permits exercising jurisdiction over the President only in those instances where "judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance." Ante, at 23. Without explanation, the majority contends that a "merely private suit for damages" does not serve this function.

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. At stake in a suit of this sort, to the extent that it is based upon a statutorily created cause of action, is the ability of Congress to assert legal restraints upon the Executive and of the courts to perform their function of providing redress for legal harm. 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.

Similarly, the majority implies that the assertion of a constitutional cause of action—the whole point of which is to assure that an officer does not transgress the constitutional limits on his authority—may offend separation of powers concerns. This is surely a perverse approach to the Constitution: Whatever the arguments in favor of absolute immunity may be, it is untenable to argue that subjecting the President to constitutional restrictions will undercut his "unique" role in our system of government. 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.

Focusing on the actual arguments the majority offers for its holding of absolute immunity for the President, one finds surprisingly little. As I read the relevant section of the Court's opinion, I find just three contentions from which the majority draws this conclusion. Each of them is little more than a makeweight; together they hardly suffice to justify the wholesale disregard of our traditional approach to immunity questions.

First, the majority informs us that the President occupies a "unique position in the constitutional scheme," including responsibilities for the administration of justice, foreign affairs, and management of the Executive Branch. *Ante*, at 17-18. True as this may be, it says nothing about why a "unique" rule of immunity should apply to the President. The President's unique role may indeed encompass functions for which he is entitled to a claim of absolute immunity. It does not follow from that, however, that he is entitled to absolute immunity either in general or in this case in particular.

For some reason, the majority believes that this uniqueness of the President shifts the burden to respondent to prove that a rule of absolute immunity does not apply. The respondent has failed in this effort, the Court suggests, because the President's uniqueness makes "inapposite" any analogy to our cases dealing with other executive officers. *Ante*, at 18. Even if this were true, it would not follow that the President is entitled to absolute immunity; it would only mean that a particular argument is out of place. But the fact is that it is not true. There is nothing in the President's unique role that makes the arguments used in those other cases inappropriate.

Second, the majority contends that because the President's "visibility" makes him particularly vulnerable to suits for civil damages, *ante*, at 20, a rule of absolute immunity is required.
The force of this argument is surely undercut by the majority's admission that "there is no historical record of numerous suits against the President." Id., at n. 33. Even granting that a *Bivens* cause of action did not become available until 1971, in the eleven years since then there have been only a handful of suits. Many of these are frivolous and dealt with in a routine manner by the courts and the Justice Department. There is no reason to think that, in the future, the protection afforded by summary judgment procedures would not be adequate to protect the President, as they currently protect other executive officers from unfounded litigation. Indeed, given the decision today in *Harlow & Butterfield v. Fitzgerald*, No. 80-945, there is even more reason to believe that frivolous claims will not intrude upon the President's time. Even if judicial procedures were found not to be sufficient, Congress remains free to address this problem if and when it develops.

Finally, the Court suggests that potential liability "frequently could distract a President from his public duties." *Ante*, at 20. Unless one assumes that the President himself makes the countless high level executive decisions required in the administration of government, this rule will not do much to insulate such decisions from the threat of liability. The logic of the proposition cannot be limited to the President; its extension, however, has been uniformly rejected by this Court. See *Butz*, *supra*; *Harlow & Butterfield*, *supra*. Furthermore, in no instance have we previously held legal accountability in itself to be an unjustifiable cost. The availability of the courts to vindicate constitutional and statutory wrongs has been perceived and protected as one of the virtues of our system of delegated and limited powers. As I argued in § I, our concern in fashioning absolute immunity rules has been that liability may pervert the decisionmaking process in a particular function by undercutting the values we expect to guide those decisions. Except for the empty generality that the President should have "the maximum ability to
deal fearlessly and impartially with the duties of his office," ante at 20, the majority nowhere suggests a particular, disadvantageous effect on a specific presidential function. The caution that comes from requiring reasonable choices in areas that may intrude on individuals' legally protected rights has never before been counted as a cost.

IV

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." Ante, at 24. 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 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, 1 Cranch 137, 163 (1803), in the name of protecting the principle of separation of powers. Accordingly, I dissent.