January 29, 1982

No. 79-1738

FIRST DRAFT

The plaintiff in this lawsuit seeks relief in civil damages from a former President of the United States. The claim rests on actions allegedly taken during the former President's tenure in office. The issue before us is the scope of the immunity possessed by the President of the United States.

I

In January 1970 the respondent A. Ernest Fitzgerald lost his job as a management analyst with the Department of the Air Force. Fitzgerald's dismissal occurred in the
context of a departmental reorganization and reduction in force, in which his job was eliminated. In announcing the reorganization, the Air Force characterized the action as taken to promote economy and efficiency in the armed forces.

Respondent's discharge attracted unusual attention in Congress and in the press. Fitzgerald had attained national prominence approximately one year earlier, during the waning months of the presidency of Lyndon B. Johnson. On November 13, 1968, Fitzgerald appeared before the Subcommittee for Economy in Government of the Joint Economic Committee of the United States Congress. To the apparent embarrassment of his superiors in the Department of Defense, Fitzgerald testified that cost-overruns on the C-5A transport plane could approximate $2 billion. He

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1 See Economics of Military Procurement: Hearings Before the Subcommittee on Economy in Government of the Joint Economic Comm., 90th Cong., 2d Sess. 199-201 (1968-1969). It is not disputed that officials in the Department of Defense were both embarrassed and angered by Fitzgerald's testimony. Within less than two months of respondent's congressional appearance, staff had prepared a memorandum for the outgoing Secretary of the Air Force, Harold Brown, listing three ways in which Fitzgerald might be removed from his position. See Joint Appendix (JA), at 209-211 (Memorandum of John Lang to Harold Brown, Jan. 6, 1969). Among these was a "reduction in force"—the means by which Fitzgerald ultimately was removed by Brown's successor in office under the new Nixon administration.
also revealed that unexpected technical difficulties had arisen during the development of the aircraft.

Concerned that Fitzgerald might have suffered retaliation for his congressional testimony, the Subcommittee on Economy in Government convened public hearings on Fitzgerald's dismissal. The press reported those hearings prominently, as it had the earlier announcement of his impending separation from the Department of Defense. At a news conference on December 9, 1969, President Richard Nixon was queried about Fitzgerald's impending separation from government service. The President responded by promising to look into the matter.

Evidence in the record establishes that


A briefing memorandum on the Fitzgerald matter had been prepared by White House staff in anticipation of a possible inquiry at the forthcoming press conference. Authored by aide Patrick Buchanan, it advanced the view that the Air Force was "firing ... a good public servant." JA, at 269 (Memorandum of Patrick Buchanan to Richard Nixon, December 5, 1969). The memorandum suggested that the President order Fitzgerald's retention by the Defense Department.

JA, at 228.
this pledge was kept. Shortly after the news conference the President asked White House Chief of Staff H.R. Haldeman to arrange for Fitzgerald's assignment to another job within the Administration. It also appears that the President suggested to Budget Director Robert Mayo that Fitzgerald might be offered a position in the Bureau of the Budget.

Fitzgerald's proposed reassignment encountered resistance within the Administration. In an internal memorandum of January 20, 1970, White House aide Alexander Butterfield reported to chief-of staff Haldeman that "Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all,

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6 See JA, at 126 (Deposition of Robert Mayo); JA, at 141 (Deposition of Richard Nixon).

7 Both Mayo and his deputy, James Schlesinger, appear to have resisted at least partly due to a suspicion that Fitzgerald lacked institutional loyalty to Executive policies and that he spoke too freely in communications with friends on Capitol Hill. Both also stated that high level positions were presently unavailable within the Bureau of the Budget. See JA, at 126 (Deposition of Robert Mayo); JA, at 146-147 (Deposition of James Schlesinger).
loyalty is the name of the game." Butterfield therefore recommended that "We should let him bleed, for a while at least." There is no evidence of White House efforts to reemploy Fitzgerald subsequent to the Butterfield memorandum.

Absent any offer of alternative federal employment, Fitzgerald complained to the Civil Service Commission (CSC). In a letter of January 20, 1970, he alleged that his separation represented unlawful retaliation for his truthful testimony before a congressional committee.  

8 Quoted in Decision of Civil Service Commission Chief Appeals Examiner (CSC Decision), JA, at 60, 84 (September 18, 1973).

9 Id., at 85. The memorandum added that "We owe 'first choice on Fitzgerald' to [Senator] Proxmire and others who tried so hard to make him a hero [for exposing the cost overruns]." Suspicion of Fitzgerald’s assumed loyalty toward Senator Proxmire was widely shared in the White House and in the Defense Department. According to the CSC Decision, supra, JA, at 83:

"While Mr. Fitzgerald has denied that he was 'Senator Proxmire's boy in the Air Force,' and he may honestly believe it, we find this statement difficult to accept. It is evident that the top officials in the Air Force, without specifically saying so, considered him to be just that.... We also note that upon leaving the Air Force Mr. Fitzgerald was employed as a consultant by the Proxmire Committee and that Senator Proxmire appeared at the Commission hearing as a character witness for [Fitzgerald]."

10 See CSC Decision, JA, at 61.
The CSC convened a closed hearing on Fitzgerald's allegations on May 4, 1971. Fitzgerald, however, preferred to present his grievances in public. After he had won a judicial injunction, *Fitzgerald v. Hampton*, 467 F.2d 755 (1972), public hearings commenced on January 26, 1973. The hearings again generated publicity, much of it devoted to the testimony of Air Force Secretary Robert Seamans. Although he denied that Fitzgerald had lost his position in retaliation for congressional testimony, Seamans testified that he had discussed Fitzgerald's loss of employment with one or more White House officials. But the Secretary declined to be more specific. He responded to several questions by invoking "executive privilege." At a news conference on January 31, 1973, the President was asked about Mr. Seamans' testimony. Mr. Nixon took the opportunity to assume personal responsibility for Fitzgerald's dismissal:

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11 See *ibid.*, JA, at 83-84.
12 See *id.*
"I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seaman must have been talking to someone who had discussed the matter with me. No, this was not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and I stick by it."

A day later, however, the White House press office issued a retraction of the President's statement. According to a press spokesman, the President had confused Fitzgerald with another former executive employee. On behalf of the President, the spokesman asserted that Mr. Nixon did not have "put before him the decision concerning Mr. Fitzgerald."  

After hearing over 4,000 pages of testimony, the chief examiner for the CSC issued his decision in the Fitzgerald case on September 18, 1973. Decision on the Appeal of A. Ernest Fitzgerald, JA, at 60. The Examiner held that Fitzgerald's dismissal had offended applicable civil service regulations. Ibid., JA, at 86-87. The

13 JA, at 185.

Examiner based this conclusion on a finding that the Departmental reorganization in which Fitzgerald lost his job, though purportedly implemented as an economy measure, was in fact motivated by "reasons purely personal to" respondent. Id. As this was an impermissible basis for a reduction in force, the Examiner recommended Fitzgerald's reappointment to his old position or to a job of comparable authority. The Examiner, however, explicitly distinguished this narrow conclusion from a suggested finding that Fitzgerald had suffered retaliation for his testimony to Congress. As found by the Commission, "the evidence in the record does not support [Fitzgerald's] allegation that his position was abolished and that he was separated ... in retaliation for his

15 The Examiner found that Fitzgerald in fact was dismissed because of his superiors' dissatisfaction with his job performance. CSC Decision, JA, at 86-87. Their attitude was evidenced by "statements that he was not a 'team player' and 'not on the Air Force team.'" Ibid., JA, at 83. Without deciding whether this would have been an adequate basis for an "adverse action" against Fitzgerald as an "inadequate or unsatisfactory employee," ibid., at 68, the Examiner held that the CSC's adverse action procedures, current version codified at 5 C.F.R. § 752, implicitly forbade the Air Force to employ a "reduction in force" as a means of dismissing respondent for reasons "personal to" him. Ibid., JA, at 87. As the Air Force had used this forbidden means of securing Fitzgerald's separation from the service, he was found entitled to reinstatement.
having revealed the C-5A cost overrun in testimony before the Proxmire Committee on November 13, 1968." Ibid., at 81.

Following the Commission's decision, Fitzgerald filed a suit for damages in the district court. In it he raised essentially the same claims presented to the CSC. As defendants he named eight officials of the Defense Department, White House aide Alexander Butterfield, and "one or More" unnamed "White House Aides" styled only as "John Does."

The District Court dismissed the action under the District of Columbia's three-year statute of limitations, Fitzgerald v. Seamans, 384 F. Supp. 688 (D.D.C. 1974), and the Court of Appeals affirmed as to all but one defendant, White House aide Alexander Butterfield, Fitzgerald v. Seamans, 553 F.2d 220 (CADC 1977). The Court of Appeals reasoned that Fitzgerald had no reason to suspect White

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16The complaint alleged a continuing conspiracy to deprive him of his job and sully his reputation. Fitzgerald alleged that the conspiracy had continued through the CSC hearings and remained in existence at the initiation of the lawsuit. See Fitzgerald v. Seamans, supra, 384 F. Supp., at 690-691.
House involvement in his dismissal at least until 1973. In that year, reasonable suspicion had arisen, most notably through publication of the internal White House memorandum in which Butterfield had recommended that Fitzgerald at least should be made to "bleed for a while" before being offered another job in the Administration. 553 F.2d, at 225, 229. Holding that concealment of illegal activity would toll the statute of limitations, the Court of Appeals remanded the action against Butterfield for further proceedings in the District Court.

Following the remand and extensive discovery thereafter, Fitzgerald filed a Second Amended Complaint in the District Court on July 5, 1978. It was in this amended complaint--more than eight years after he had first complained of his discharge to the Civil Service Commission--that Fitzgerald first named the petitioner Nixon as a party defendant. Also included as defendants

The general allegations of the complaint remained generally unchanged. In averring Nixon's participation in the alleged conspiracy against him, the complaint quoted petitioner's press conference statement that he was "totally aware" of and in fact "approved" Fitzgerald's dismissal. Second Amended Complaint, at 6.
were White House aide Bryce Harlow and other officials of the Nixon administration. Additional discovery ensued.

By March 1980, only three defendants remained: the petitioner Richard Nixon and White House aides Bryce Harlow and Alexander Butterfield. Denying a motion for summary judgment, the District Court ruled that the action must proceed to trial. Its order of March 26 held that Fitzgerald had stated triable causes of action under two federal statutes and the First Amendment to the Constitution.\(^{18}\) The Court also ruled that petitioner was not entitled to claim absolute presidential immunity.

Petitioner took a collateral appeal of the immunity.

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\(^{18}\) See Appendix to Petition for Certiorari, at 1a-2a. The District Court held that respondent was entitled to "infer" a cause of action under 5 U.S.C. § 7211 (Supp. III 1979) and 18 U.S.C. § 1505. Neither expressly confers a private right to sue for relief in damages. The first, 5 U.S.C. § 7211 (Supp. III 1979), provides generally that "The right of employees ... to ... provide information to either House of Congress, or a committee or a Member thereof shall not be interfered with or denied." The second, 18 U.S.C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. The correctness of the decision that a cause of action could be "implied" under these statutes is not currently before us. As explained infra, this case is here under the "collateral order" doctrine, for review of the District Court's denial of petitioner's motion to dismiss on the ground that he enjoyed absolute immunity from civil suit. The District Court also held that respondent had stated a claim under the common law of the District of Columbia. Respondent subsequently abandoned his common law claim, however, and we are not presented with any issue of immunity under the common law of District of Columbia.
decision to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed summarily. It apparently did so on the ground that its recent decision in *Halperin v. Kissinger*, 606 F.2d 1192 (CADC 1979), aff'd by an equally divided vote, ___ U.S. ___ (1981), had decisively rejected this claimed immunity defense and that the appeal therefore failed to present a substantial question under the law of the Circuit.

As this Court has not ruled on the scope of immunity available to a President of the United States, we granted certiori to decide this important issue. ___ U.S. ___ (1981).

**II**

Before addressing the merits of this case, we must consider two challenges to our jurisdiction. In his opposition to the petition for certiorari, respondent argued that the District Court had not yet entered any appealable order. In the absence of a final judgment, he dismissed the petitioners' interlocutory appeal for lack of jurisdiction, he contended that there was no "case" yet ripe for review by this Court.\(^{19}\) We also must consider an argument that an

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Footnote(s) 19 will appear on following pages.
agreement between the parties has mooted the controversy.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254, a statute that invests us with authority to review "cases in" the Court of Appeals.19 Although respondent has not repeated this argument in his brief on the merits, the challenge was jurisdictional. As jurisdictional questions cannot be waived by the parties, we think it appropriate to discuss the issue raised at that stage of the litigation.

The statute provides in pertinent part:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree...."


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19 See Brief for Respondent in Opposition, at 2. Although respondent has not repeated this argument in his brief on the merits, the challenge was jurisdictional. As jurisdictional questions cannot be waived by the parties, we think it appropriate to discuss the issue raised at that stage of the litigation.

20 The statute provides in pertinent part:
Under the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), a small class of interlocutory orders are immediately appealable to the courts of appeals. This class embraces orders that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." *Cooper & Lybrand v. Livesay*, 437 U.S. 463, 464 (1978); see *Cohen, supra*, 337 U.S., at 546-547. At least twice before this Court has held that orders denying claims of absolute immunity are appealable under these criteria. See *Helstoski v. Meanor*, 442 U.S. 500 (1979) (claim of immunity under the Speech and Debate Clause); *Abney v. United States*, 431 U.S. 651 (1977) (claim of immunity under Double Jeopardy Clause). Because the denial of petitioner's claim of immunity represented a collateral order appealable under the *Cohen* doctrine, this case was "in" the Court of Appeals within the meaning of the statute and is currently ripe for our review.21

Footnote(s) 21 will appear on following pages.
B

Shortly after petitioner had filed his petition for certiorari in this Court and respondent had entered his opposition, the parties reached an agreement to liquidate damages. Under its terms, the petitioner Nixon paid the respondent Fitzgerald a sum of $142,000. In consideration, Fitzgerald agreed to accept liquidated damages in the sum of $28,000 in the event of a ruling by this Court that petitioner was not entitled to absolute immunity. In case of a decision upholding petitioner's immunity claim, no further payments would occur.

The limited agreement between the parties left both petitioner and respondent with a considerable financial

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21 There can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction—a power we have exercised routinely. See, e.g., Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978). If we lacked authority to do so, decisions to dismiss for want of jurisdiction would be insulated entirely from review by this Court.

22 Respondent filed a copy of this agreement with the Clerk of this Court on August 24, 1981, as an appendix to his Brief in Opposition to a Motion of Morton, Ina, David, Mark and Gary Halperin to Intervene and for Other Relief. On June 10, 1980—prior to the Court's action on the petition for certiorari, counsel to the parties had advised the Court that their clients had reached an agreement to liquidate damages, but that there remained a live controversy. Counsel did not include a copy of the agreement in their initial submission.
stake in the resolution of the question presented in this Court. As we recently concluded in a case involving a similar contract, "Given respondents' continued active pursuit of monetary relief, this case remains 'definite and concrete, touching the legal relations of parties having adverse legal interests.'" Havens Realty Co. v. Coleman, draft op., at 6, quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-241 (1937).

III

This Court consistently has recognized that government officials are entitled to some form of immunity from suits for civil damages. In Spalding v. Vilas, 161 U.S. 483 (1896), the Court considered the immunity available to the Postmaster General in a suit for damages based upon his official acts. Relying heavily on English cases at common law, the Court concluded that "[t]he interests of the people," id., at 498, required a grant of absolute immunity to public officers. In the absence of immunity, the Court reasoned, executive officials would hesitate to exercise their discretion in a way "injuriously affect[ing] the claims of particular
individuals," id., at 499, even when the public interest required bold and unhesitating action. Considerations of "public policy and convenience" therefore compelled a judicial recognition of immunity from suits arising from official acts.

"In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subject to any such restraint."

Id., at 498.

Decisions subsequent to Spalding have extended the defense of immunity to actions besides those at common law. Tenney v. Brandhove, 341 U.S. 367 (1951), held that the passage of 42 U.S.C. § 1983 had not abrogated the common-law privilege accorded to state legislators. And the decision in Pierson v. Ray, 386 U.S. 547 (1967), similarly affirmed the extension under § 1983 of the absolute immunity historically accorded to judges. Pierson also held that police officers possess a qualified immunity protecting them from suit when their official acts are performed in "good faith." Id., at 556.
In Scheuer v. Rhodes, 416 U.S. 232 (1974), the Court considered the immunity properly afforded state executive officials in a § 1983 suit alleging the violation of constitutional rights. In that case we rejected the officials' claim to absolute immunity under the doctrine of Spalding v. Vilas, holding that state executive officials possessed only a "good faith" immunity from suits alleging constitutional violations.

The approach adopted in Scheuer and subsequent cases arguably narrowed the "official acts" doctrine recognized in Spalding v. Vilas. As construed by subsequent cases, Scheuer mandated a two-tiered division of immunity defenses. To most executive officers Scheuer accorded qualified immunity. For them the scope of the defense varied in proportion to the nature of their official functions and the range of decisions that conceivably might be taken in "good faith": "[S]ince the options which a 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." This "functional"
approach also defined a second tier, however, at which the especially sensitive functions of a few officials—notably judges and prosecutors—required the continued recognition of absolute immunity. See, e.g., Imbler v. Pachtman, 424 U.S. 409 (1976) (state prosecutors possess absolute immunity with respect to the initiation and pursuit of prosecutions); Stump v. Sparkman, 435 U.S. 349 (1978) (state judge possesses absolute immunity for all judicial acts).

In Butz v. Economou, 438 U.S. 478 (1978), the Court considered for the first time the kind of immunity possessed by federal executive officials who are sued for constitutional violations. In Butz, the Court rejected an argument, based on decisions involving federal officials charged with common law torts, that all high federal officials should be accorded absolute immunity from constitutional damage actions. Concluding that a blanket grant of absolute immunity would be anomalous in light of the qualified immunity standard applied to state executive officials, 438 U.S., at 504, and "would seriously erode the protection provided by basic constitutional
guarantees," \textit{id.}, at 508, we extended the approach to immunity questions that we had applied in suits against state officials in cases under § 1983. In so doing we reaffirmed our holdings that some officials, notably judges and prosecutors, have "special functions requir[ing] a full exemption from liability." \textit{id.}, at 508. In \textit{Butz} itself we accorded absolute immunity to administrative officials engaged in functions analogous to those of judges and prosecutors. \textit{id.} We also left open the possibility that other federal officials might show that "public policy requires an exemption of that scope." \textit{id. at."

This case now presents the claim that public policy requires the extension of absolute immunity to the President of the United States from civil damage suit liability.

In addressing claims of entitlement to immunity, this Court has recognized that "the law of privilege as a defense to damage actions against officers of Government has 'in large part been of judicial making.'" \textit{Butz v. Economou}, supra, 438 U.S., at 501-502, quoting \textit{Barr v. Matteo}, 360 U.S. 564, 569 (1959); \textit{Doe v. McMillan}, 412
U.S. 306, 318 (1973). This is not to say that our decisions have not been rooted in federal statutes or the Constitution. Our cases under § 1983 formally have involved exercises in statutory construction. See, e.g., Tenney v. Brandhove, 341 U.S. 367 (1951). Other decisions have been rooted either on the literal text of the Constitution, e.g., Powell v. McCormack, 395 U.S. 486, 506 (1969) (recognizing immunity of Congressmen under Speech and Debate Clause), or on inferences of constitutional purpose drawn from constitutional language and structure, e.g., Gravel v. United States, 408 606, 418 (1972) (extending congressional immunity to a congressional aide, in order to "implement [the] fundamental purpose" of the Speech and Debate Clause); cf. Butz v. Economou, supra, 438 U.S., at 508-517. Nonetheless, at least in the absence of clear guidance from the Congress, in deciding immunity questions we have followed in the tradition of common law courts by freely weighing considerations of public policy.23 As a second

23Four basic rationales support immunity for public officials. First, the prospect of damages liability may Footnote continued on next page.
element of our immunity inquiries we also have examined the scope of the immunity historically afforded to particular officials at common law. See Butz v. Economou, supra, 438 U.S., at 508; Imbler v. Pachtman, 424 U.S. 409, 421 (1976).

In the case of the President the historical and policy inquiries tend to converge. Because the presidency did not exist through most of the development of common law, any historical analysis must draw its evidence from our constitutional heritage.24 The relevant evidence render officials unduly cautious in the discharge of their public responsibilities. See Gregoire v. Biddle, 177 F. 2d 579, 581 (CA2 1949), cert. denied, 339 U.S. 949 (1950). Second, competent and responsible individuals may be deterred from entering public service in the first place. Third, public servants may be distracted from their duties by the need to defend frequent lawsuits. Finally, as this case illustrates, there is a danger of unfairness when officials face personal liability for decisions made in areas of legal uncertainty that are reviewed by courts years later, under evolving legal standards. See generally Freed, Executive Official Immunity for Constitutional Violations: An Analysis and a Critique, 72 Nw. L. Rev. 526, 529-530 (1977).

Although there has been some controversy over this issue, it generally is agreed that high executive officials enjoyed absolute immunity at common law. See, e.g., Davis, Administrative Officers' Tort Liability, 55 Mich. L. Rev. 201, 202 (1959); Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1210 n.121 (1977); but cf. A. Dicey, Introduction to the Study of the Law of the Constitution 193 (10th ed. 1959) (prime Minister of Great Britain historically liable for official misconduct); Engdahl, Immunity and Accountability for Positive Government Wrongs, 44 U. Colo. L. Rev. 1, 14-21, 52 (1972) (executives in 19th century America subject to "draconian" liability, but this was a departure from the traditional common law rule).
We consider this immunity a functionally mandated incident

of powers among the branches of government: considerations
in part animated and in part defined by an
that define one important aspect of the requisite inquiry into

regarding public policy. The importance of individual

rights also identifies a powerful policy concern in suits
arising under the Constitution and laws of the United
States. But we consistently have held that concerns of

policy justify the immunity of some officials even from

suits of this kind.

In this case a former President asserts immunity
from civil damage claims of two kinds. He stands named as
a defendant in a direct action under the Constitution and
two statutory actions under federal laws of general
applicability. In neither case has Congress taken express
legislative action to subject the President to civil

liability for his official acts.

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 acts in office.

We consider this immunity a functionally mandated incident
of the President's unique position, rooted in the doctrine of the separation of powers and justified by considerations of public policy.

V

A

In arguing that the President is entitled only to qualified immunity, the respondent relies on cases in which we have granted immunity of this scope to governors and cabinet officers. We find these cases to be inapposite. Article II of the Constitution provides that


"There are ... incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them .... 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."

26Under the "good faith" standard, an official will be held immune from damages liability unless "he knew or reasonably should have know that the action he took within his sphere of official responsibility" was unconstitutional or "he took the action with malicious intention to cause a deprivation of constitutional rights or other injury...." Wood v. Strickland, 420 U.S. 308, 322 (1975).

"The executive Power shall be vested in a President of the United States...." This grant of authority establishes the President as the chief constitutional officer of the Executive branch. The President's unique status distinguishes him from other executive officials. Further, the President's supervisory and policy responsibilities encompass areas of utmost discretionary authority. These include the administration of justice—it is the President who is charged constitutionally to "take care that the laws be faithfully executed";

28 Noting that the "Speech and Debate Clause" provides a textual basis for congressional immunity, respondent argues that the Framers must be assumed to have rejected any the propriety of Executive immunity. Petitioner, on the other hand, offers historical arguments that the Framers affirmatively assumed presidential immunity to have been established by the adoption of the constitutional scheme. Although we need not embrace petitioner's argument in order to decide this case, we do reject respondent's suggestion that the constitutional text somehow prohibits a judicial recognition of absolute immunity; at least in the absence of a clear congressional signal to the contrary—in order to facilitate operation of effective government under the constitutional order. There are two difficulties with respondent's argument. First, a specific textual basis has not been considered a prerequisite to the recognition of immunity. No provision expressly confers judicial immunity. Yet the immunity of judges is well settled. See, e.g., Bradley v. Fisher, 13 Wall 335 (1872); Stump v. Sparkman, supra. Second, this Court has established that immunity may be extended to certain officials of the Executive Branch. Butz v. Economou, supra, 438 U.S., at 511-512; see Imbler v. Pachtman, supra, (extending immunity to prosecutorial officials within the Executive branch).

29 U.S. Const., Art II, § 3.
conduct of foreign affairs--a realm in which the Court has recognized that "It would be intolerable that courts, without relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret"; and management of the personnel of the Executive branch--a task for which "imperative reasons require an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties."  

B

In deference to the President's singular constitutional mandate, the courts traditionally have exercised their jurisdiction over him with caution and restraint. This Court has never held that courts may compel the President to perform even ministerial functions. By contrast, injunctions compelling action

Footnote continued on next page.


32Although this issue has not been faced squarely by the Court, there have been strong statements in previous opinions asserting the immunity of the President from judicial orders. In Mississippi v. Johnson, 71 U.S. 475, 501 (1866), the Court stated: "we are fully satisfied
that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us." And in Kendall v. United States, 12 Pet. 524, 610 (1838), it is stated: "The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power."). But see National Treasury Employees Union v. Nixon, 492 F.2d 587, 616 (1974) (concluding that a court possesses "the authority to mandamus the President to perform the ministerial duty" of effectuating a pay raise).

Even in United States v. Nixon, the court held that Presidential conversations and correspondence enjoy a "presumptive privilege" that is "inextricably rooted in the separation of powers." 418 U.S., at 708. We suggested that this privilege may be more absolute when matters of diplomacy or national security are involved. Id., at 706, 710-711.

Strong historical considerations support the traditional judicial reluctance to enjoin action by the President. At the time of the first Congress, Vice President John Adams and Oliver Ellsworth, Senator from Connecticut, were reported as stating that "the President, personally, was not subject to any process whatever; could have no action, whatever, brought against him; and above the power of all judge, justices, etc." since otherwise a court could "stop the whole machinery of government." 2 W. Maclay, Sketches of Debate in the First Senate of the United States 152 (Harris ed. 1880). Justice Story offered a similar argument somewhat later See 3 J. Story, Commentaries on the Constitution of the United States § 1563, at 418-519 (1st ed. 1833).

It also is clear that Thomas Jefferson believed the President not to be subject to judicial process. When Chief Justice Marshall held in United States v. Burr, 25 Fed. Cas. 30 (1807), that a subpoena duces tecum can be issued to a President, Jefferson protested strongly, and stated his broader view of the proper relationship between the Judiciary and the President:

"The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the commands of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties? The intention of the Constitution, that each branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means

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Footnote(s) 33 will appear on following pages.
distinction is reflected in the approach of this Court to cases in which various officials have claimed an evidentiary privilege. The courts generally have looked to the common law to determine the scope of an official's privilege. In assessing claims by the President, however, we have recognized that presidential immunity is "rooted in the separation of powers under the Constitution." United States v. Nixon, 418 U.S. 683, 708 (1974).


than to the executive." 10 The Works of Thomas Jefferson 404n. (P. Ford ed. 1905) (quoting a letter from President Jefferson to a prosecutor at the Burr trial) (emphasis in the original). See also 5 D. Malone, Jefferson and His Time: Jefferson the President 320-325 (1974).

33 See Youngstwon Sheet & Tile Co. v. Sawyer, 343 U.S. 579 (1952) (injunction directed to Secretary of Commerce); Kendall v. United States, supra (mandamus to enforce ministerial duty of the Postmaster General).

(1952). But it does mandate that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the executive branch. In cases in which 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, cf. Youngstown Sheet & Tube Co. v. Sawyer, supra—the exercise of jurisdiction has been held warranted. In the case of a merely private suit for damages based on a President's official acts, we hold

35 Although the President was not a party, the Court enjoined the Secretary of Commerce from executing a direct presidential order. See 343 U.S., at 583.


37 Even in the case of officials possessing absolute immunity, this Court sometimes has held that this immunity extends only to acts in performance of particular functions. See Butz v. Economou, supra, 438 U.S., at 508-517; cf. Imbler v. Pachtman, supra, 424 U.S., at 430-431. In the case of the President, however, powerful prudential reasons counsel our rejection of this selective approach. Under the Constitution and laws of the United States the President has discretionary responsibilities in a unique variety of sensitive areas. His constitutional mandate went to civil and criminal litigation policy, national security, and organization and assignment of Executive personnel. In many cases it would be difficult to determine which presidential "function" encompassed a particular action. Thus, in order to administer functional distinctions among Presidential actions, judges frequently would need to inquire into the purpose for which acts were taken. Inquiries of this kind would be
nearly as intrusive as inquiries into the possible malice of the President under a standard of qualified immunity.

In determining the proper scope of an absolute privilege, this Court repeatedly has refused to draw lines finer than concerns of policy would support. See, e.g., Spalding v. Vilas, supra, 161 U.S., at 498 (privilege extends to all matters "committed by law to [an official's] supervision or control"); Barr v. Matteo, supra, 360 U.S., at 575 (fact "that the action taken here was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable..."); Stump v. Sparkman, supra, 435 U.S., at 363 & n. 12 (judicial privilege applies even to acts occurring outside "the normal attributes of a judicial proceeding"). In view of the special nature of the President's constitutional office, we think it appropriate to extend to him absolute immunity from damage actions based on acts within the "outer perimeter" of his area of official responsibility.

In this case respondent argues that petitioner Nixon would have acted outside the perimeter of his duties by ordering the discharge of respondent Fitzgerald, who was lawfully entitled to retain his job in the absence of "such cause as will promote the efficiency of the service." Brief for Respondent, at 39, citing 5 U.S.C. § 7512(a). Because Congress has granted this legislative protection, petitioner argues, no federal official could, within his authority, cause Fitzgerald to be dismissed without satisfying this standard of proof. This construction of the President's authority would subject him to trial on every allegation of tortious illegality and thereby deprive absolute immunity of its intended effect. It clearly is within the President's authority to "prescribe" the manner in which the Secretary will "conduct the business" of the Air Force. 10 U.S.C. § 8012(b). Because this grant includes the authority to prescribe reorganizations and reductions in force, petitioner's alleged wrongful acts lay within the outer perimeter of his authority.

It has never been denied that absolute immunity imposed a "lame-duck" cost on the individuals whose rights have been violated. As Judge Learned Hand wrote in Gregoire v. Biddle, 177 F.2d 579, 581 (CA2 1949), cert. denied, 339 U.S. 949 (1950):

"It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for ... [denying recovery] is that it is impossible to know..."

Footnote continued on next page.
The threat of suits for damages could deflect a
President's energies from labors to advance public policy
to efforts to avoid personal liability. Due to the
special prominence of his office, the President would be
an easily identifiable subject of damage actions by every
disgruntled citizen. The threat of liability might, for
example, instill an unwanted hesitancy to remove
inefficient or even disloyal personnel, to enforce the
laws against groups or individuals prone to litigation, or
to pursue efficiencies disadvantageous to those benefited
by prevailing policies. 39 Exposure of the President to

whether the claim is well founded until the case
has been tried, and to submit all officials, the
innocent as well as the guilty, to the burden
of trial and to the inevitable danger of its
outcome, would dampen the ardor of all but the
most resolute . . . . As is so often the case, the
answer must be found in a balance between the
evils inevitable in either alternative."

Footnote continued on next page.

In weighing the balance of advantages, this Court has
found that there is a lesser public interest in actions
for civil damages than, for example, in criminal
prosecutions, United States v. Gillock, 100 S. Ct. 1185,
1193 (1980); see United States v. Nixon, supra, 418 U.S.,
at 711-712 and n. 19 (basing holding on special importance
of evidence in a criminal trial and distinguishing civil
actions as raising different questions not presented for
decision).

39 The argument that frivolous lawsuits can be
handled summarily has only limited
force. A Lawsuits
involving a qualified-immunity standard generally require
courts to inquire into the motives of the defendants, and
Footnote continued on next page.
damages actions also could distort the process of decisionmaking at the highest levels of the executive branch. Anticipating lawsuits, the President and his advisers naturally would have an incentive to devote scarce energy, not to performance of their public duties, but to compilation of a record insulating the President against subsequent liability.

VI

such matters are difficult to resolve short of prolonged discovery or trial. This case itself has been in the courts since 1974. As Judge Gesell stated in his concurring opinion in Halperin v. Kissinger, supra:

"We should not close our eyes to the fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials in their personal capacities based on alleged constitutional torts. Each such suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas.... Such discovery is wide-ranging, time-consuming, and not without considerable cost to the officials involved. It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decision maker's mental processes are involved.... In short, if these standards are those to be followed in these cases, trial judges will almost automatically have to send such cases to full trials on the merits." 606 F.2d, at 1214.

These dangers are significant even though there is no historical record of numerous suits against the President, since a right to sue federal officials for damages for constitutional violations was not even recognized until Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).
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. There remains first the constitutional remedy of impeachment. In addition, Presidents may be prosecuted criminally, at least after they leave office. Moreover, there are informal checks on Presidential misconduct that do not apply with equal force to other executive officials. The President is subjected to constant scrutiny by Congress and by the press. Their vigilance may serve to deter Presidential misconduct, 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

40 The presence of alternative remedies has played an important role in our previous decisions in the area of official immunity. E.g., Imbler v. Pachtman, supra, at 428-429 ("We emphasize that the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish the which occurs.")

41 The same remedy plays a central role with respect to the misconduct of federal judges, who also possess absolute immunity. See Kaufman, Chilling Judicial Independence, 88 Yale L.J. 681, 690-706 (1979). Congressman may be removed from office by a vote of their colleagues. U.S. Const., Art. I, § 5, cl. 2.
historical stature.

The existence of alternative remedies and deterrents clearly 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 remedy for misconduct in order to advance compelling public ends.

VII

For the reasons stated in this opinion, the decision of the Court of Appeals is reversed and the case remanded for action consistent with this opinion. So ordered.