

Sec. 3—Legislative, Diplomatic, and Law Enforcement Duties of the President

Different rules prevail when such an official is sued for a “constitutional tort” for wrongs allegedly in violation of our basic charter,⁸²² although the Court has hinted that in some “sensitive” areas officials acting in the “outer perimeter” of their duties may be accorded an absolute immunity from liability.⁸²³ Jurisdiction to reach such officers for acts for which they can be held responsible must be under the general “federal question” jurisdictional statute, which, as recently amended, requires no jurisdictional amount.⁸²⁴

COMMISSIONING OFFICERS

The power to commission officers, as applied in practice, does not mean that the President is under constitutional obligation to commission those whose appointments have reached that stage, but merely that it is he and no one else who has the power to commission them, and that he may do so at his discretion. Under the doctrine of *Marbury v. Madison*, the sealing and delivery of the commission is a purely ministerial act which has been lodged by statute with the Secretary of State, and which may be compelled by mandamus unless the appointee has been in the meantime validly re-

ment because the FTCA has not waived sovereign immunity. *United States v. Smith*, 499 U.S. 160 (1991) (Westfall Act bars suit against federal employee even when an exception in the FTCA bars suit against the government). Cognizant of the temptation of the government to immunize both itself and its employee, the Court in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), held that the Attorney General’s certification is subject to judicial review.

⁸²² An implied cause of action against officers accused of constitutional violations was recognized in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Butz v. Economou*, 438 U.S. 478 (1978), a *Bivens* action, the Court distinguished between common-law torts and constitutional torts and denied high federal officials, including cabinet secretaries, absolute immunity, in favor of the qualified immunity previously accorded high state officials under 42 U.S.C. § 1983. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court denied presidential aides derivative absolute presidential immunity, but it modified the rules of qualified immunity, making it more difficult to hold such aides, other federal officials, and indeed state and local officials, liable for constitutional torts. In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Court extended qualified immunity to the Attorney General for authorizing a warrantless wiretap in a case involving domestic national security. Although the Court later held such warrantless wiretaps violated the Fourth Amendment, at the time of the Attorney General’s authorization this interpretation was not “clearly established,” and the *Harlow* immunity protected officials exercising discretion on such open questions. See also *Anderson v. Creighton*, 483 U.S. 635 (1987) (in an exceedingly opaque opinion, the Court extended similar qualified immunity to FBI agents who conducted a warrantless search).

⁸²³ *Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982).

⁸²⁴ See 28 U.S.C. § 1331. On deleting the jurisdictional amount, see Pub. L. 94–574, 90 Stat. 2721 (1976), and Pub. L. 96–486, 94 Stat. 2369 (1980). If such suits are brought in state courts, they can be removed to federal district courts. 28 U.S.C. § 1442(a).