

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

cally motivated harassing and frivolous litigation. Congress has the power, the Court advised, if it should think necessary to legislate, to afford the President protection.<sup>816</sup>

### The President's Subordinates

While the courts may be unable to compel the President to act or to prevent him from acting, his acts, when performed, are in proper cases subject to judicial review and disallowance. Typically, the subordinates through whom he acts may be sued, in a form of legal fiction, to enjoin the commission of acts which might lead to irreparable damage<sup>817</sup> or to compel by writ of mandamus the performance of a duty definitely required by law.<sup>818</sup> Such suits are usually brought in the United States District Court for the District of Columbia.<sup>819</sup> In suits under the common law, a subordinate executive officer may be held personally liable in damages for any act done in excess of authority,<sup>820</sup> although immunity exists for anything, even malicious wrongdoing, done in the course of his duties.<sup>821</sup>

<sup>816</sup> The Court observed at one point that it doubted that defending the suit would much preoccupy the President, that his time and energy would not be much taken up by it. "If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency." 520 U.S. at 702.

<sup>817</sup> *E.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (suit to enjoin Secretary of Commerce to return steel mills seized on President's order); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (suit against Secretary of Treasury to nullify presidential orders on Iranian assets). *See also* *Noble v. Union River Logging Railroad*, 147 U.S. 165 (1893); *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912).

<sup>818</sup> *E.g.*, *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803) (suit against Secretary of State to compel delivery of commissions of office); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838) (suit against Postmaster General to compel payment of money owed under act of Congress); *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497 (1840) (suit to compel Secretary of Navy to pay a pension).

<sup>819</sup> This was originally on the theory that the Supreme Court of the District of Columbia had inherited, via the common law of Maryland, the jurisdiction of the King's Bench "over inferior jurisdictions and officers." *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 614, 620–21 (1838). Congress has now authorized federal district courts outside the District of Columbia also to entertain such suits. 76 Stat. 744 (1962), 28 U.S.C. § 1361.

<sup>820</sup> *E.g.*, *Little v. Barreme*, 6 U.S. (2 Cr.) 170 (1804); *Bates v. Clark*, 95 U.S. 204 (1877); *United States v. Lee*, 106 U.S. 196 (1882); *Virginia Coupon Cases* (*Poindexter v. Greenhow*), 114 U.S. 269 (1885); *Belknap v. Schild*, 161 U.S. 10 (1896).

<sup>821</sup> *Spalding v. Vilas*, 161 U.S. 483 (1896); *Barr v. Matteo*, 360 U.S. 564 (1959). *See Westfall v. Erwin*, 484 U.S. 292 (1988) (action must be discretionary in nature as well as being within the scope of employment, before federal official is entitled to absolute immunity). Following the *Westfall* decision, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the *Westfall Act*), which authorized the Attorney General to certify that an employee was acting within the scope of his office or employment at the time of the incident out of which a suit arose; upon certification, the employee is dismissed from the action, and the United States is substituted, the Federal Tort Claims Act (FTCA) then governing the action, which means that sometimes the action must be dismissed against the govern-