

dent during the electoral process acts to curb the occurrences of presidential misconduct; this factor has unique application to the President, who is the only elected official in the Executive Branch of the federal government. So, too, the President's role as the leader of his political party adds further effect to the constraints imposed through the electoral process. Moreover, the force of public opinion and the vigilance of the news media operate to deter and apprehend a President about to forsake the honor and confidence reposed in him.³⁰ Finally, the existence of judicial review of presidential actions³¹ serves to contain and correct the unauthorized exercise of the President's powers.

§ 6)—was grounded in the long and difficult development of legislative privilege in England. See *United States v. Johnson*, 383 U.S. 169, 177–183 (1966). In light of this history, the Framers perceived the need expressly to preserve congressional independence by “protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary” (*id.* at 179); the absence of a similar background regarding the other two branches of government elucidates the omission of an express immunity provision to safeguard their independence. In any event, despite the lack of any specific constitutional provision, absolute immunities for judges and prosecutors are well-established. See *Butz v. Economou*, 438 U.S. 478 (1978); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871). Indeed, this Court in *Butz* and, at least by implication, in *Imbler*, has upheld absolute immunities for certain Executive Branch officials in the federal government. See also *Yaselli v. Goff*, 275 U.S. 503 (1927), aff'g 12 F.2d 396 (2d Cir. 1926). The court of appeals' reasoning in this regard is contrary to these settled principles of absolute immunity.

³⁰ See *United States v. Brewster*, *supra*, 408 U.S. at 523 & n.16:

[U]nfettered debate in an open society with a free press * * * [has discouraged] abuses of power * * * [and has not] tolerated them long when they arose. * * * [An important practical consideration] is the omnipresence of the news media whose traditional function and competitive inclination afford no immunities to reckless or irresponsible official misconduct.

³¹ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

Because of the unique responsibilities and prominence of the presidency, all of these considerations have special bearing with respect to the Office of the President. As discussed above (see pages 21–24, *supra*), the Framers of the Constitution, after thorough consideration focusing specifically on the presidency, concluded that the foregoing safeguards were sufficient to channel the exercise of presidential authority. As they recognized, “[s]elf-discipline and the voters must be the ultimate reliance for discouraging or correcting *** abuses.” *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951). Damages actions against the President are an unnecessary additional deterrent, whose benefits are far outweighed by the costs they would impose on the proper functioning of the presidency, and, in turn, on the Nation.

b. It is also evident that a qualified or conditional immunity for the President would be seriously inadequate and would thereby “disserv[e] the broader public interest *** [in the] vigorous and fearless performance of the *** [President’s] duty ***.” *Imbler v. Pachtman*, *supra*, 424 U.S. at 427. “If the mere allegation that a *** [presidential] act was undertaken for an unworthy purpose would lift the protection of the *** [immunity], then the *** [immunity] simply would not provide the protection historically undergirding it.” *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 508–509 (1975). To the extent that only a qualified immunity is available to the President, the allegations of improper motive would have to “be inquired into *** [and the President] would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence.” *Bradley v. Fisher*, *supra*, 80 U.S. (13 Wall.) at 354.

In our view, recognition of only a qualified presidential privilege would lead to an extreme and unwarranted interference with the decision-making process of the Executive Branch and the execution of presidential duties under Article II of the Constitution. As discussed below (see pages 50–51, 60–61, *infra*), a qualified immunity rests on

the reasonableness of the decision and the good faith with which it was made. Thus, the rule of law adopted by the court of appeals, by requiring the President routinely to explain and justify his decisions in response to civil damages suits, would result in recurring judicial oversight of the President's discretionary actions. Indeed, the court of appeals recognized that such review would occur and that, at least with respect to the good-faith element of the immunity defense, would ordinarily necessitate a full trial (Pet. App. 38a-40a). This excessive intrusion into the very Office of the President is unparalleled in our Nation's history and should be scrupulously avoided. See *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499-501 (1866); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610 (1838); see also *Committee to Establish the Gold Standard v. United States*, 392 F. Supp. 504, 506 (S.D.N.Y. 1975); *Meyers v. Nixon*, 339 F. Supp. 1388, 1391 (S.D.N.Y. 1972); *Atlee v. Nixon*, 336 F. Supp. 790, 792 (E.D. Pa. 1972); *San Francisco Redevelopment Agency v. Nixon*, 329 F. Supp. 672 (N.D. Cal. 1971); *Suskin v. Nixon*, 304 F. Supp. 71, 72-73 (N.D. Ill. 1969); *Trimble v. Johnston*, 173 F. Supp. 651, 652-654 (D.D.C. 1959).

A qualified immunity is rendered further inadequate by the litigation process itself. In order to defend himself, the President would generally be forced to reveal not only the intimate details of executive decision-making but also the confidential and highly sensitive information on which he based his actions. This is directly at odds with the "presumptive privilege for Presidential communication" recognized in *United States v. Nixon*, 418 U.S. 683, 708 (1974). As the Court there explained (*id.* at 705-706, 708, 715; footnotes omitted):

[One] ground [supporting the privilege] is the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detri-

ment of the decisionmaking process. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

* * * * *

The expectation of a President to the confidentiality of his conversations and correspondence *** [is premised in part on] the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.***

* * * * *

It is therefore necessary in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice.

See also Pet. App. 51a, 53a (Gesell, J., concurring). In addition to this sweeping breach of presidential confidentiality, the release of such information would often be prohibited by law or otherwise contrary to the national interest. Cf. *United States v. Reynolds*, 345 U.S. 1 (1953).³² And beyond these disclosure concerns, the complexity and gravity of presidential responsibilities, and the pressures

³² Moreover, in the case of a former President, as here, the relevant materials simply may not be available for use in the lawsuit. See II J.A. 7.

The Fourth Circuit has recently held that a government official personally sued for damages must bear the loss if his defense rests on

and urgency under which they are exercised, may be impossible to convey to a lay jury.

The presentation of such issues in a *** [personal damages] action often would require *** the resolution of some technical issues by the lay jury. It is fair to say, we think, that the honest *** [President] would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials. Frequently acting under serious constraints of time and even information, a *** [President] inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a *** [President] responsible annually for hundreds of *** [major decisions].

Imbler v. Pachtman, supra, 424 U.S. at 425-426. See also Pet. App. 52a (Gesell, J., concurring) ("these cases *** will necessarily embroil juries in passing upon the intricacies of executive decisionmaking").

Finally, the protections necessary for the Office of the President "would be of little value if *** [the President] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against *** [him] based upon a jury's speculation as to motives." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 405 (1979), quoting *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). The President should not be put to the risk of convincing a jury several years later, in the aftermath of subsequent national events and possible political fervor, that he acted reasonably and in good faith at the time. See *Imbler v. Pachtman, supra*, 424 U.S. at 425-426. See also Pet. App. 52a (Gesell, J., concurring) ("many of these cases are political in character [and] involve highly con-

materials that cannot be disclosed because of military and state secrets. *Farnsworth Cannon, Inc. v. Grimes*, No. 79-1260 (4th Cir. June 12, 1980), slip op. 10-16. Under this analysis, it would appear that the President would lose his qualified immunity by default whenever, as is likely, the information necessary to establish that defense is withheld on grounds of government privilege.

troversial acts"). "In times of political passion, dishonest or vindictive motives are readily attributed to *** [presidential] conduct and as readily believed." *Eastland v. United States Servicemen's Fund*, *supra*, 421 U.S. at 509, quoting *Tenney v. Brandhove*, *supra*, 341 U.S. at 378. "The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial" (*Imbler v. Pachtman*, *supra*, 424 U.S. at 419 n.13), and "in the face of [a mistake] an official may later find himself hard put to it to satisfy a jury of his good faith" (*Gregoire v. Biddle*, *supra*, 177 F.2d at 581).

Likewise, the burdens of such litigation—the time, the expense, the personal anxiety, and the unavoidable disruption of official duties—should not be imposed upon the President. "[A] private civil action *** creates a distraction and forces *** [the President] to divert *** [his] time, energy, and attention from *** [his presidential] tasks to defend the litigation." *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, No. 79-198 (June 2, 1980), slip op. 13, quoting *Eastland v. United States Servicemen's Fund*, *supra*, 421 U.S. at 503; see also *Imbler v. Pachtman*, *supra*, 424 U.S. at 425. As Thomas Jefferson explained during his presidency, "[t]he Constitution enjoins [the President's] constant agency in the concerns of six millions of people. Is the law paramount to this, which calls on him on behalf of a single one?" II D. Watson, *The Constitution of the United States* 1014 (1910).³³ Accordingly, "[t]o preserve *** [presidential] independence *** [the President] *** should be protected not only from the consequences of litigation's results but also from the burden of defending *** [him-

³³As this Court recently noted in *Herbert v. Lando*, 441 U.S. 153 (1979), a plaintiff who bears the burden of proving malice must be given a fair opportunity to question the defendant to develop the relevant evidence. The same rule would presumably apply when it is the defendant who bears the burden of proof with respect to his subjective good faith (see *Gomez v. Toledo*, No. 79-5601 (May 27, 1980)) and the plaintiff "make[s] 'some showing' of malice to state a genuine issue as to the *bona fides* of the official's [qualified] immunity defense" (*Chagnon v. Bell*, No. 79-1232 (D.C. Cir. Aug. 14, 1980), slip op. 29-30). Thus, a rule limiting the President to a qualified immunity might re-

self]." *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, *supra*, slip op. 12, quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967), and *Tenney v. Brandhove*, *supra*, 341 U.S. at 376; see also *Hutchinson v. Proxmire*, 443 U.S. 111, 123 (1979).³⁴

4. The foregoing considerations are especially apt with regard to the areas of presidential responsibility involved in the present suit—national security and foreign affairs. The President's broad powers in these matters—matters that involve “important, complicated, delicate and manifold problems” (*United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936))—flow directly from Article II of the Constitution and are beyond dispute. The President is “both * * * [the] Commander-in-Chief and * * * the Nation’s organ for foreign affairs * * *.” *Chicago & Southern Air Lines, Inc. v. Waterman Steamship*

quire the President to attend a deposition or answer interrogatories in a private civil suit, at the expense of his duties as Chief Executive, or risk the imposition of sanctions, including a default judgment. See Fed. R. Civ. P. 37(b). Indeed, the court of appeals candidly acknowledged that “[q]uestions of intent and subjective attitude frequently cannot be resolved without direct testimony of those involved” (Pet. App. 38a). This disruption of daily activities might be justified when dealing with a subordinate executive official, but it should not be permitted in the case of the President.

³⁴The Court’s expectation in *Butz v. Economou* that “[i]nsubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading” and that “firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits” (438 U.S. at 507, 508) has proven to be a false hope. See *Hanrahan v. Hampton*, No. 79-912 (June 2, 1980), slip op. 5-7 (Powell, J., concurring in part and dissenting in part); see also Pet. App. 40a n.121; *id.* at 51a-53a (Gesell, J., concurring). Indeed, the court of appeals in this case conceded (*id.* at 38a) that pretrial procedures often are not suitable for resolving the validity of a qualified-immunity defense. Despite its recognition that personal damages actions would impose “extraordinary practical difficulties * * * [on] a President” (*id.* at 47a), the court of appeals could only exhort that district courts “carefully examine any pretrial claim [for summary judgment]” (*id.* at 38a) and “be sensitive” to these problems in overseeing the course of the litigation (*id.* at 47a). As Judge Gesell rightly observed (*id.* at 51a), this limited approach “extend[s] no more protec-

Corp., 333 U.S. 103, 111 (1948). "In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations." *New York Times Co. v. United States*, 403 U.S. 713, 727 (1971) (Stewart, J., concurring); see also *id.* at 741 (Marshall, J., concurring); *id.* at 756-758 (Harlan, J., dissenting); *id.* at 761 (Blackmun, J., dissenting). "[T]he President of the United States has the fundamental duty, under Art. II, §1, of the Constitution, to 'preserve, protect and defend the Constitution of the United States.' Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means. *** We recognize *** the constitutional basis of the President's domestic security role ***." *United States v. United States District Court*, 407 U.S. 297, 310, 320 (1972). In exercising this constitutional authority, the President must be ever mindful of the vital duty with which he is charged:

It has been said that "[t]he most basic function of any government is to provide for the security of the individual and of his property." *Miranda v. Arizona*, 384 U.S. 436, 539 (1966) (White, J., dissenting). And unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered. As Chief Justice Hughes reminded us in *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941):

"Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."

tion to top federal officials than is afforded by the normally applicable summary judgment principles" and "substantially undermines, if not destroys, the immunity doctrine." Contrary to the Court's admonition in *Butz*, "trial judges will almost automatically have to send such cases to full trials on the merits" (Pet. App. 52a) (Gesell, J., concurring). See also *Nixon v. Fitzgerald*, petition for cert. pending, No. 79-1738 (filed May 2, 1980) (trial necessary to determine qualified immunity of President for refusal to order the rehiring of government employee).

United States v. United States District Court, supra, 407 U.S. at 312.

Nor can it be doubted that secrecy is essential to the proper execution of these presidential powers.

[I]t is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.

New York Times Co. v. United States, supra, 403 U.S. at 728-730 (Stewart, J., concurring). As the Court has recently observed, “[t]he Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.” *Snepp v. United States*, Nos. 78-1871, 79-265 (Feb. 19, 1980), slip op. 3 n.3. See also *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., supra*, 333 U.S. at 111; *United States v. Curtiss-Wright Export Corp., supra*, 299 U.S. at 319-321; *Totten v. United States*, 92 U.S. (2 Otto) 105 (1875).³⁵

³⁵ President Washington explained this need for secrecy in declining the request of the House of Representatives to produce materials relating to the Jay Treaty:

The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent

The national interest in the President's successful conduct of this country's defense and foreign affairs strongly supports an absolute presidential immunity from personal damages liability. Least of all in these critical areas should there be countenanced even the slightest inhibition on the vigorous and resolute discharge of the President's constitutionally based responsibilities. Likewise, it is in precisely these areas that the judiciary should be most unwilling, in the guise of deciding monetary liability, to undertake review of the President's discretionary decisions. It is also in these areas that litigation on the reasonableness and good faith of the President's actions would most surely both endanger the national welfare through the disclosure of confidential information and be beyond the ken of the trier of fact. And there is in these volatile areas a substantial risk of damages actions by those dissatisfied, for whatever reason, with the President's determinations.

5. The grounds offered by the court of appeals to afford only a qualified presidential immunity are unpersuasive.

reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.

I J. Richardson, *Messages and Papers of the Presidents* 194-195 (1896), quoted in *United States v. Curtiss-Wright Export Corp.*, *supra*, 299 U.S. at 320-321. Indeed, the Framers of the Constitution viewed the President's ability to maintain secrecy and confidentiality regarding foreign affairs and national security as one of the most beneficial aspects of his Office. See II M. Farrand, *supra*, at 538 (remarks of James Wilson); *ibid.* (remarks of Roger Sherman); IV M. Farrand, *supra*, at 17 (remarks of George Mason); *The Federalist* No. 64 (J. Jay) at 12-13 (1914 ed.); *The Federalist* No. 70 (A. Hamilton), *supra*, at 50; *The Federalist* No. 75 (A. Hamilton) at 83 (1914 ed.); III J. Story, *supra*, §§ 1504 at 357, 1505 at 358, 1507 at 360.

The court first reasoned that the existence of a qualified immunity would not "hinder effective governance of the nation * * * [because] suits that may successfully be pursued against a President will be quite rare" (Pet. App. 45a; footnote omitted). As previously discussed, however (see pages 26-28, 32-37, *supra*), there is in fact every reason to believe that personal damages actions against the President will inhibit the execution of his responsibilities and thereby impair the essential operation of government. Moreover, in striking the balance between competing public policies, the dearth of meritorious cases against the President militates in favor of, rather than against, an absolute presidential immunity. See *Gregoire v. Biddle*, *supra*, 177 F.2d at 581. At all events, it is the prospect and vexation of these suits, not just their actual success, that serves to chill the fearless and resolute exercise of presidential authority.

The court of appeals also concluded that the President is entitled to no greater immunity than the *Butz* good-faith defense generally enjoyed by executive officers because he cannot be set "apart from * * * other high Executive officials" (Pet. App. 42a) and "no defensible distinction can be made between the President and other high Executive officers for immunity purposes" (*id.* at 48a n.144). However, as already discussed (see pages 25-38, *supra*), the President does occupy a position far different from those held by his subordinates in the Executive Branch. As the highest elected official in the Nation and the only constitutional officer in the Executive Branch, the Chief Executive possesses powers and responsibilities that are unparalleled in the government, especially in the areas of national security and foreign affairs. The complexity, importance, and controversial nature of the issues that come to the President's attention; the commitment of the full executive power to a single individual, the express duties imposed on him by the Constitution, and the manifold matters, both domestic and foreign, that require his personal involvement; his unique status as the only official in the Executive Branch who is chosen by and directly accountable to

the electorate—these and like considerations serve to distinguish the Office of the President.³⁶

In rejecting an absolute immunity, the court of appeals further observed that *Butz v. Economou* does not permit any greater protection for the President than the qualified immunity afforded the governor of a state in actions under 42 U.S.C. 1983 (Pet. App. 48a n.144, citing *Scheuer v. Rhodes*, 416 U.S. 232 (1974)). But, once again, this line of argument ignores the singular role of the Office of the President. The authority and duties of a governor fall far short, in both kind and degree, of those of the President. In particular, a governor has no responsibility with regard to the critical areas of national defense and foreign policy. See *United States v. Curtiss-Wright Export Corp.*, *supra*, 299 U.S. at 316. As the Court recognized in *Butz v. Economou*, the governor of a state is analogous not to the President but to “the head of a federal department” (438 U.S. at 501; see also *id.* at 500–501 n.28). Moreover, a governor is not a federal official and does not exercise powers delegated by the Constitution. Hence, judicial oversight of the performance of his functions does not threaten an interference with constitutional obligations or present problems implicating the separation of powers.³⁷

Finally, the court of appeals incorrectly viewed an absolute presidential immunity as inconsistent with “our tra-

³⁶Courts have long been sensitive to the special role of the President and have endeavored, to the extent they have jurisdiction over him at all, to safeguard the President from the burdens and distractions of litigation in which he is named as a defendant. See page 33, *supra*; see also *United States v. Nixon*, *supra*, 418 U.S. at 715; *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 606 (D.C. Cir. 1974); *Nixon v. Sirica*, 487 F.2d 700, 709 (D.C. Cir. 1973) (en banc). Cf. *United States v. Burr*, 25 Fed. Cas. 30, 34 (No. 14,692d) (C.C.D.Va. 1807). The same concern justifies an absolute presidential immunity in damages actions.

³⁷By the same token, the court of appeals’ analogy between the President and a state governor fails to appreciate that Congress, through the federal system of checks and balances, its investigative authority, and its impeachment power, provides alternative restraints on the President that are absent with respect to a governor. In addi-

dition of equal justice under law" (Pet. App. 49a) and the maxim that "[n]o man in this country is so high that he is above the law" (*ibid.*, quoting *United States v. Lee*, 106 U.S. (16 Otto) 196, 220 (1882)). It has never been thought that judicial officers, prosecuting attorneys, and state legislators were placed "above the law" because of their absolute immunity. See, e.g., *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, *supra*; *Butz v. Economou*, *supra*, 438 U.S. at 508-517; *Stump v. Sparkman*, *supra*; *Imbler v. Pachtman*, *supra*. The immunity "is not for the protection or benefit of a malicious or corrupt *** [official], but for the benefit of the public" (*Imbler v. Pachtman*, *supra*, 424 U.S. at 418 n.12, quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967); see also *Eastland v. United States Servicemen's Fund*, *supra*, 421 U.S. at 502, quoting *United States v. Brewster*, 408 U.S. 501, 507 (1972)). "The privilege is not a badge or emolument of exalted office" (*Barr v. Matteo*, 360 U.S. 564, 572 (1959) (plurality opinion)), but instead rests on the acknowledged necessity that the legal system must "reconcile the plaintiff's right to compensation with the need to protect the decisionmaking processes of an executive department" (*Butz v. Economou*, *supra*, 438 U.S. at 503).

The fact that the principle of separation of powers and the "special functions" of the presidency (*Butz v. Economou*, *supra*, 438 U.S. at 508) give rise to an absolute presidential immunity does not "mean in any sense that a President is above the law, but relates to the singularly unique role under Art. II of a President's communications and activities *** [and] to the performance of

tion, the important national political checks applicable to a President are also less effective in the case of a governor. "The President is the only nationally elected officer, and thus, at least arguably, our most politically accountable official." Cutler & Johnson, *Regulation and the Political Process*, 84 Yale L.J. 1395, 1411 (1975). For these reasons, "the assumption that the Federal Government could keep its own officers under control [even without constitutional tort actions]" (*District of Columbia v. Carter*, 409 U.S. 418, 429-430 (1973)) serves to distinguish the immunity appropriate for the President and that due a state governor.

duties under that Article." *United States v. Nixon*, *supra*, 418 U.S. at 715.³⁸ The threat of personal liability for the President, and the routine judicial oversight of his decisions, would dangerously inhibit the vigorous and decisive discharge of his constitutional duties and unduly intrude into his decision-making processes. It would also impair the national interest to burden the President's uniquely valuable time and attention with the defense of such personal damages suits and to compel him, at the risk of individual liability, to explain and justify his actions. Accordingly, both the Constitution and important considerations of public policy require that the President be accorded an absolute immunity from damages liability, in order that he may exercise the duties of his Office "without harassment or intimidation" (*Butz v. Economou*, *supra*, 438 U.S. at 512) and may pursue the objectives of his administration "sanctioned by the electorate" (*Elrod v. Burns*, 427 U.S. 347, 367 (1976) (plurality opinion)).

B. ABSOLUTE PRESIDENTIAL IMMUNITY EXTENDS TO THOSE WHO ACT ON THE PRESIDENT'S BEHALF AT HIS DIRECTION

If, as we urge, the Court recognizes the existence of an absolute presidential immunity from damages liability, that immunity should extend to those who act on the President's behalf at his direction. Since President Nixon "authorized this entire program" (I J.A. 212), and since petitioners Kissinger, Mitchell, and Haldeman "were operating under [his] specific authority and were carrying

³⁸The Framers of the Constitution were well aware of both the potential dangers presented by the Executive and the inviolability of the King under the English legal system. See pages 21-24, *supra*; see also *The Federalist No. 69* (A. Hamilton), *supra*, at 41, 47. In light of that awareness, they expressly provided that the President "would be amenable to personal punishment and disgrace" through impeachment, removal, and criminal prosecution (*id.* at 47). An absolute presidential immunity, therefore, does not elevate a President above the law but instead recognizes his accountability to the law in a way that also allows the uninhibited conduct of his Office.

out [his] express orders" (I J.A. 48-49), they are entitled to a derivative absolute immunity in this case.

The responsibilities of the presidency are extraordinarily numerous, complex, and far-reaching. Of necessity, therefore, the President must delegate to others many of the tasks and functions relating to his Office. "[I]t is literally impossible, in view of the complexities of the modern *** [presidency], for *** [the President] to perform *** [his duties] without the help of aides and assistants ***." *Gravel v. United States*, 408 U.S. 606, 616 (1972). "[T]he President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates." *Buckley v. Valeo*, 424 U.S. 1, 135 (1976), quoting *Myers v. United States*, 272 U.S. 52, 117 (1926); see also *Barr v. Matteo*, 360 U.S. 564, 573 (1959) (plurality opinion). In view of this fact of governmental life, it must be recognized "that the day-to-day work of such aides is so critical to the *** [President's] performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the *** [absolute presidential immunity] will inevitably be diminished and frustrated." *Gravel v. United States*, *supra*, 408 U.S. at 616-617. Accordingly, "for the purpose of construing the privilege [the President] and his aide[s] are to be 'treated as one'" (*id.* at 616, quoting *United States v. Doe*, 455 F.2d 753, 761 (1st Cir. 1972)), and thus the absolute presidential immunity "applies not only to *** [the President] but also to his aides insofar as the conduct of the latter would be a protected *** act if performed by the *** [President] himself" (408 U.S. at 618).

This concept of derivative immunity is well established in the context of legislative immunity under the Speech or Debate Clause. See *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 507 (1975) (chief counsel of Senate subcommittee); *Doe v. McMillan*, 412 U.S. 306, 312, 320 (1973) (clerk, staff director, and counsel of House committee, consultant and investigator for the committee, and Superintendent of Documents and Public Printer); *Gravel v. United States*, *supra* (personal legislative assistant to senator); see also *Butz v. Economou*, *supra*, 438

U.S. at 496 n.23. The Court has also recognized the doctrine of derivative immunity for officials of the Executive Branch. See *Doe v. McMillan*, *supra*, 412 U.S. at 323 ("the Printing Office is immune from suit when it prints for an executive department *** only *** to the extent that the department head himself would be immune if he ran his own printing press and distributed his own documents"). And the courts of appeals have likewise applied the principle in a variety of circumstances. See, e.g., *Chagnon v. Bell*, No. 79-1232 (D.C. Cir. Aug. 14, 1980), slip op. 10-11 n.9 (FBI agents conducting a national-security wiretap at direction of Attorney General); *Ashbrook v. Hoffman*, 617 F. 2d 474 (7th Cir. 1980) (partition commissioners appointed by state court in divorce proceeding); *Green v. DeCamp*, 612 F.2d 368 (8th Cir. 1980) (counsel for state legislative committee); *Spaulding v. Nielsen*, 599 F.2d 728 (5th Cir. 1979) (federal probation officers who prepared presentence report at the direction of the court); *Kermit Construction Corp. v. Banco Credito Y Ahorro Ponceno*, 547 F.2d 1 (1st Cir. 1976) (receiver appointed by state court); *Berndtson v. Lewis*, 465 F.2d 706 (4th Cir. 1972) (Navy captain acting at designation of Secretary of the Navy and Vice Admiral in charge of naval personnel); *Heine v. Raus*, 399 F.2d 785 (4th Cir. 1968) (CIA employee acting at instructions of CIA Director); but see *Forsyth v. Kleindienst*, 599 F.2d 1203, 1216 (3d Cir. 1979), petition for cert. pending, No. 79-1120 (filed Jan. 18, 1980); *Johnson v. Alldredge*, 488 F.2d 820, 825 (3d Cir. 1973), cert. denied, 419 U.S. 882 (1974).³⁹

In line with these authorities and the sound reasons of public policy on which they rest, petitioners Kissinger, Mitchell, and Haldeman should be absolutely immune in the circumstances of this case. Each of them acted, within the area of his respective responsibility, at the instance of

³⁹We also note that the doctrine of derivative immunity accords with common-law rules of agency and liability. See, e.g., *Restatement (Second) of Agency* § 345 (1958); Comment, *Spying and Slandering: An Absolute Privilege for the CIA Agent?*, 67 Colum. L. Rev. 752, 770 (1967).

the President. It is clear, as respondents recognize (Br. in Opp. 20), that these petitioners were "acting in concert with the President." To deny them a derivative immunity would undermine the absolute protection of the President and would interfere with the unfettered discharge of presidential duties. For the same reasons that support an absolute immunity for the President, the Court should afford a corresponding derivative immunity to officials like Kissinger, Mitchell, and Haldeman, who act on behalf of the President pursuant to his specific directions.⁴⁰

C. PETITIONERS KISSINGER, MITCHELL, AND HALDEMAN ARE ENTITLED TO ABSOLUTE IMMUNITY FOR ADVISING THE PRESIDENT ON MATTERS WITHIN THEIR RESPECTIVE AREAS OF RESPONSIBILITY

Petitioners Kissinger, Mitchell, and Haldeman have been sued in this case, at least in part, because of advice they rendered to the President—National Security Director Kissinger, for counseling the President on the security impact of leaks of sensitive information and for furnishing names of NSC personnel who had access to leaked material; Attorney General Mitchell, for advising the President on matters of law regarding national-security wiretaps; and Assistant to the President Haldeman, for providing information to the President in connection with his assigned review of the summaries of information resulting from the wiretap (see pages 2-5, *supra*). Insofar as the courts below have sought to premise damages liability on these actions, we submit that such a ruling was erroneous

⁴⁰ We emphasize that this case does not involve a vague or general delegation of presidential authority to distant subordinates. Rather, petitioners Kissinger, Mitchell, and Haldeman were all high-ranking officials of the Executive Branch, and, as discussed above (see pages 2-5, *supra*), their roles in the overall program were defined with particularity by the President. While petitioners undoubtedly exercised some discretion in carrying out the President's directives, the nature and limits of their responsibilities were quite specifically designated. As the above cases make clear, the existence of discretion in performing delegated duties does not defeat a claim of derivative immunity.

and that petitioners Kissinger, Mitchell, and Haldeman are entitled to absolute immunity for their roles in advising the President.

The Constitution (Art. II, § 2) authorizes the President to obtain the opinion "of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."⁴¹ Indeed, even without this express provision, the President's authority to require the opinion of his closest aides and advisors "would result of itself from the office." *The Federalist No. 74* (A. Hamilton) at 77 (1914 ed.). Thus, high-ranking executive officials act under a constitutional duty when they furnish their opinion to the President in response to his request.

As the Court has recognized, this exchange of information between presidential advisors and the President is protected by a privilege of confidentiality that has "constitutional underpinnings." *United States v. Nixon*, *supra*, 418 U.S. at 706. This "privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties * * * [and is] inextricably rooted in the separation of powers under the Constitution" (*id.* at 705, 708). Especially in the areas of national defense and foreign policy (*id.* at 706), such a privilege should be afforded the greatest weight.

In light of the constitutional authority of the President to demand the opinion of his advisors "upon any Subject relating to the Duties of their * * * Offices" and the constitutional privilege that attaches to their communications, subordinate executive officials are entitled to absolute immunity from civil damages actions arising out of advice they gave to the President. Allowing a President's closest

⁴¹This provision of the Constitution was adopted with little debate. See, e.g., II M. Farrand, *supra*, at 499, 541–543, 575, 599; II D. Watson, *supra*, at 923–934. Alexander Hamilton believed the provision to be "a mere redundancy in the plan" in light of the President's inherent authority (*The Federalist No. 74* (A. Hamilton) at 77 (1914 ed.)), but, as Mr. Justice Story noted, "it is not without use, as it imposes a more strict responsibility, and recognises a public duty of high importance and value in critical times" (III J. Story, *supra*, § 1487, at 343).

advisors only a qualified immunity in this regard, with its attendant uncertainties and inhibiting effect, would seriously impair the President's constitutional authority to receive their views. Moreover, as discussed above (see pages 33-34, *supra*), a trial on the issues of reasonableness and good faith would severely breach the constitutional privilege acknowledged in *United States v. Nixon* and would deter the expression of "candid, objective, and even blunt or harsh opinions in Presidential decisionmaking" (418 U.S. at 708).⁴²

Accordingly, because the spectre of personal damages liability in these circumstances would unduly interfere with the obligations of presidential advisors under Art. II, § 2, to the detriment of "the conduct of the public business" (*Butz v. Economou, supra*, 438 U.S. at 507), petitioners Kissinger, Mitchell, and Haldeman should be

⁴² These concerns are well illustrated in this case, particularly with regard to petitioner Mitchell. Acting pursuant to his constitutional obligation to advise the President and his statutory duty to "give his advice and opinion on questions of law when required by the President" (28 U.S.C. 511), Attorney General Mitchell informed the President that, in his professional judgment, the initiation of the Halperin wiretap complied with the Constitution. Because the President could not be constrained to act only when the lawful course was clear, the Attorney General was required by his Office to make a legal determination on this complex and unsettled issue. In discharging his responsibility to assist the President in selecting the seemingly lawful action, the Attorney General would have been seriously inhibited if his legal judgment were formed under the threat of personal damages liability.

Indeed, because of the difficulty and novelty of the legal issues that confront the Attorney General, it can be expected that courts will not always agree with his considered legal conclusions. But the court of appeals essentially held that each time the judiciary disagrees with the Attorney General's advice, and suit is brought by an aggrieved party claiming malice or bad faith, the Attorney General must affirmatively establish his personal good faith in the performance of his Office. Such a burden would be regarded as intolerable if imposed on the district courts or courts of appeals each time one of their decisions was set aside on appeal. See *Stump v. Sparkman, supra*, 435 U.S. at 359-360; *Bradley v. Fisher, supra*, 80 U.S. (13 Wall.) at 349. The burden can no more easily be borne by the Attorney General. Under the holding of this case, he must prove his good faith by testimony and evidence sub-

held absolutely immune in responding to the President's request for advice. The "special nature of their responsibilities" (*id.* at 511) as Cabinet officers and White House officials, coupled with the safeguards that minimize "the risk of an unconstitutional act" (*id.* at 514),⁴³ warrant "a full exemption from liability" (*id.* at 508) based on performance of their advisory and counseling functions.⁴⁴

II. PETITIONERS ARE ENTITLED TO QUALIFIED IMMUNITY AS A MATTER OF LAW

In the event the Court concludes, contrary to our contention, that absolute immunity is unavailable in this case, we submit that petitioners are entitled to qualified immunity as a matter of law.

mitted in lawsuits brought (as here) years after the relevant events have transpired. And the Attorney General may have to explain to a lay jury why he elected one rather than another interpretation of a complex question of law. The imposition of this burden on the Attorney General "would contribute not to principled and fearless decision-making but to intimidation." *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

⁴³The giving of advice to the President cannot, without more, constitute a constitutional tort. Rather, that advice must first be accepted and acted upon by the President, who exercises his independent judgment based on information from a number of sources. Thus, the internal process of presidential decision-making serves to check the occurrence of unconstitutional actions resulting from the recommendations of a presidential advisor. Moreover, a presidential advisor bears the responsibility for the positions he presents to the President and the consequences of his advice. Especially where the President is making a decision in reliance upon an advisor's recommendation, this internal accountability strongly deters improper conduct by the subordinate.

⁴⁴Apart from the immunities derived from relations with the President, high-ranking government officials in certain circumstances may also be entitled to an independent absolute immunity based on the "special functions" of their positions (*Butz v. Economou, supra*, 438 U.S. at 508). See, e.g., *Mitchell v. Zweibon*, petitions for cert. pending, Nos. 79-881, 79-883 (filed Dec. 7, 1979); *Mitchell v. Forsyth*, petition for cert. pending, No. 79-1120 (filed Jan. 18, 1980). While the Court's resolution of the presidential immunity issue will serve to clarify the application of *Butz*, we believe that, in light of the close nexus between presidential directives and the particular conduct at issue here, the Court need not reach any question of independent immunity in this case.

The doctrine of qualified immunity is premised on the belief that "it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Butz v. Economou*, 438 U.S. 478, 506-507 (1978). The Court's decisions have "emphasized *** that, at least in the absence of some showing of malice, an official would not be held liable in damages *** unless the constitutional right he was alleged to have violated was 'clearly established' at the time of the violation" (*id.* at 498). See also *Wood v. Strickland*, 420 U.S. 308, 322 (1975). This "standard incorporates the idea that liability should not attach unless there was notice that a constitutional right was at risk." *Owen v. City of Independence, Missouri*, No. 78-1779 (Apr. 16, 1980), slip op. 12-13 (Powell, J., dissenting). And, of course, a government official is not "charged with predicting the future course of constitutional law." *Wood v. Strickland, supra*, 420 U.S. at 322, quoting *Pierson v. Ray*, 386 U.S. 547, 557 (1967); see also *Butz v. Economou, supra*, 438 U.S. at 507; *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975). "Constitutional law is what the courts say it is, and *** even the most prescient lawyer would hesitate to give a firm opinion on matters not plainly settled." *Owen v. City of Independence, Missouri, supra*, slip op. 13 (Powell, J., dissenting).

In *Procunier v. Navarette*, 434 U.S. 555 (1978), the Court applied these principles to hold that the public officials sued in that case were entitled to qualified immunity as a matter of law. Finding that the defendants "could not reasonably have been expected to be aware of a constitutional right that had not yet been declared," the Court concluded "[a]s a matter of law *** [that] there was no basis for rejecting the immunity defense on the ground that [the officials] knew or should have known that their alleged conduct violated a constitutional right" (*id.* at 565). Accordingly, "the Court held that since the constitutional right allegedly violated had not been authoritatively declared at the time the *** officials acted, the officials

were entitled, as a matter of law, to prevail on their claim of qualified immunity." *Baker v. McCollan*, 443 U.S. 137, 139 (1979).

In the circumstances of the present case, it is clear that the alleged constitutional violations did not involve "settled, indisputable law" or "basic, unquestioned constitutional rights." *Wood v. Strickland*, *supra*, 420 U.S. at 321, 322. At the time the instant wiretap was authorized in April and May of 1969, the constitutional standards pertaining to national-security wiretaps were, at the least, unsettled. Indeed, it was less than two years earlier that the Court had first held the Fourth Amendment to be applicable to wiretaps at all. See *Berger v. New York*, 388 U.S. 41 (1967). None of the Court's ensuing decisions in *Katz v. United States*, 389 U.S. 347 (1967); *Alderman v. United States*, 394 U.S. 165 (1969); *Giordano v. United States*, 394 U.S. 310 (1969); and *Taglianetti v. United States*, 394 U.S. 316 (1969), dealt specifically with national-security wiretaps. To the contrary, the opinions in those cases recognized the separate and unresolved status of such wiretaps under the Fourth Amendment. See *Berger v. New York*, *supra*, 388 U.S. at 62;⁴⁵ *id.* at 113, 115-116 (White, J., dissenting);⁴⁶ *Katz v. United States*,

⁴⁵ The Court's opinion in *Berger* cited to the Supplemental Memorandum for the United States in *Schipani v. United States*, No. 504 (O.T. 1966), which stated (page 4) that "[p]resent governmental practice * * * prohibits such electronic surveillance in all instances except those involving the collection of intelligence with respect to matters affecting national security. * * * [T]he specific authorization of the Attorney General must be obtained in each instance when the national security exception is sought to be invoked."

⁴⁶ As Attorney General Ramsey Clark explained in the congressional hearings cited by Mr. Justice White:

Chairman Cellar. The bill is definitely limited to cases involving national security?

Mr. Clark. Directly involving the national security; that is right.

Chairman Cellar. And you do not ask that there be an interposition of a court order in the case of national security; it shall be on your say-so?

supra, 389 U.S. at 358 n.23; *id.* at 359-360 (Douglas, J., concurring); *id.* at 363-364 (White, J. concurring). As Mr. Justice Stewart observed in *Giordano v. United States*, *supra*, 394 U.S. at 314 (concurring opinion), "the Court has not in any of these cases addressed itself to the standards governing the constitutionality of electronic surveillance relating to the gathering of foreign intelligence information—necessary for the conduct of international affairs, and for the protection of national defense secrets and installations from foreign espionage and sabotage."

More than three years later, in *United States v. United States District Court*, 407 U.S. 297 (1972), the Court clearly acknowledged the distinct nature of national-security wiretaps in light of "[t]he covertness and complexity of potential unlawful conduct against the Government" (*id.* at 311-312) and "the necessarily broad and continuing nature of intelligence gathering" (*id.* at 320):

Mr. Clark. That is correct.

* * * * *

Mr. Corman. * * *

Getting back to your practice as presently established, who are the primary authorities under the statute who may authorize wiretapping or eavesdropping under this bill, under the national security section?

Mr. Clark. The way the section reads, it provides that the constitutional power of the President shall not be limited by this bill in the national security area. The manner in which he exercises that constitutional power, insofar as the language § 2514 is concerned, is left to him.

Mr. Corman. Then there is no limitation on his power to delegate that authority, as far as this statute is concerned; is that correct?

Mr. Clark. As far as this statute is concerned, yes.

Mr. Corman. Are there other statutory limitations on his authority to delegate power that would be effective here?

Mr. Clark. No. Since 1940, as a matter of practice, the wiretaps have been placed by the approval of the Attorney General.

Hearings on H.R. 5386 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 90th Cong., 1st Sess. 288, 292 (1967).

We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of "ordinary crime." The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.

* * * Different standards [for national-security wiretaps] may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens.

Id. at 322-323. Even in holding that prior judicial approval was constitutionally required for "domestic" national-security wiretaps, the Court expressly declined to "attempt to detail the precise standards for domestic security warrants" (*id.* at 323) or to establish constitutional standards for "foreign" national-security wiretaps (*id.* at 308-309, 321-322). Although the District of Columbia Circuit later adverted to "some of the considerations which a judge should take into account in deciding whether it is reasonable to authorize installation of electronic surveillance equipment [in a foreign national-security case]," *Zweibon v. Mitchell*, 516 F.2d 594, 658 (D.C. Cir. 1975) (en banc; plurality opinion), cert. denied, 425 U.S. 944 (1976) (*Zweibon I*), it was not until 1978 (apart from the district court's decision in the present case) that a court first addressed the reasonableness standard specifically applicable to wiretaps in the national-security context. See *United States v. Humphrey*, 456 F. Supp. 51 (E.D. Va. 1978), aff'd in pertinent part *sub nom. United States v. Truong Dinh Hung*, Nos. 78-5176, 78-5177 (4th Cir. July

17, 1980). See also *Chagnon v. Bell*, No. 79-1232 (D.C. Cir. Aug. 14, 1980), slip op. 25-29.⁴⁷

The uncertain state of the law was most evident with respect to the warrant requirement for national-security wiretaps. The government, upon consideration by a succession of Presidents and Attorneys General, had long been of the view that the President had the constitutional power to authorize national-security surveillance and that a judicial warrant was not required. See Pet. App. 80a-85a; see also pages 2-3 and note 3, *supra*; Brownell, *The Public Security and Wire Tapping*, 39 Cornell L.Q. 195, 197-200 (1954); Rogers, *The Case for Wire Tapping*, 63 Yale L.J. 792, 794-797 (1954).⁴⁸ In *Katz v. United States*, *supra*, the Court expressly reserved decision on this question (389 U.S. at 358 n.23). In his concurring opinion, Mr. Justice White endorsed the government's view, stating that "[w]e should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable" (389 U.S. at 364). However, Mr. Justice Douglas' concurring opinion rejected the government's argument (*id.* at 359-360). See also *Giordano v. United States*, *supra*, 394 U.S. at 314-315 (Stewart, J., concurring) (issue of warrant requirement for national-security wiretaps "remains open").⁴⁹

⁴⁷ We also note that the reasonableness standard specifically applicable to wiretaps in traditional criminal investigations was substantially clarified by this Court in *Scott v. United States*, 436 U.S. 128 (1978). The Court prefaced its discussion by noting that, "[b]ecause of the necessarily ad hoc nature of any determination of reasonableness, there can be no inflexible rule of law which will decide every case." *Id.* at 139. See also *Chagnon v. Bell*, *supra*, slip op. 27; *Kilgore v. Mitchell*, No. 78-2702 (9th Cir. July 22, 1980), slip op. 7-8.

⁴⁸ Attorney General Mitchell also concluded that the existing procedures for national-security wiretaps were lawful (II J.A. 178) and, after discussions with the Solicitor General's Office and the Criminal Division of the Department of Justice, that these procedures were unaffected by the Court's decisions in *Katz* and *Alderman* (II J.A. 178-179, 180-181, 182-183).

⁴⁹ As Mr. Justice Stewart added (394 U.S. at 135), "[o]ne might suppose that all of this should be entirely clear to any careful reader of the

During the period of the Halperin wiretap, several courts sustained the government's position, holding that in national-security cases a warrant was not required under either the Fourth Amendment or Section 605 of the Federal Communications Act of 1934, 47 U.S.C. (1964 ed.) 605. See *United States v. Clay*, Cr. No. 67 H 94 (S.D. Tex. July 14, 1969), aff'd, 430 F.2d 165 (5th Cir. 1970), rev'd on other grounds, 403 U.S. 698 (1971); *United States v. O'Baugh*, 304 F. Supp. 767 (D.D.C. 1969); *United States v. Butenko*, 318 F. Supp. 66 (D.N.J. 1970), aff'd, 494 F.2d 593 (3d Cir.) (en banc), cert. denied, 419 U.S. 881 (1974); *United States v. Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970) (I J.A. 127-134); *United States v. O'Neal*, No. KC-CR-1204 (D. Kan. Sept. 1, 1970) (I J.A. 135-137). The first contrary decisions were rendered during the final month of the Halperin surveillance in cases involving "domestic" security wiretaps. See *United States v. Smith*, 321 F. Supp. 424 (C.D. Cal. 1971), and *United States v. Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971). The issue of warrantless national-security wiretaps continued to divide the lower courts, however,⁵⁰ and the question finally reached this Court—more than a year after the Halperin wiretap had been terminated—on review of the *Sinclair* decision. See *United States v. United States District Court*, 407 U.S. 297 (1972). Although eventually holding that a warrant was constitutionally required for domestic national-security wiretaps, the Court noted that it was addressing the issue "for the first time" (*id.* at 299) and that the question had been "left open by *Katz*" (*id.* at 309). The Court also emphasized that "[s]uccessive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees, without

Court's opinion ***. Perhaps so, *** [b]ut 10 years of experience here have taught me that the most carefully written opinions are not always carefully read—even by those most directly concerned."

⁵⁰ See *United States v. Enten*, 388 F. Supp. 97 (D.D.C. 1971), aff'd on other grounds *sub nom. United States v. Lemonakis*, 485 F.2d 941, 961-963 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974); *United States v. Lyttle*, Cr. No. 58942-71 (D.C. Super. Ct. Jan. 12, 1972) (I J.A. 138-141).

guidance from the Congress or a definitive decision of this Court" (*id.* at 299), and that the government's contentions in support of warrantless surveillance "merit the most careful consideration" (*id.* at 319).⁵¹

Moreover, while resolving the warrant issue for "domestic" national-security wiretaps, the Court reserved decision on the constitutional requirements applicable in cases of "foreign" national-security surveillance. *United States v. United States District Court, supra*, 407 U.S. at 308-309, 321-322. Several courts thereafter held that a warrant was not required for any such foreign security wiretap. See *United States v. Butenko*, 494 F.2d 593 (3d Cir.) (en banc), cert. denied, 419 U.S. 881 (1974); *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974); see also *United States v. Buck*, 548 F.2d 871, 875-876 (9th Cir.), cert. denied, 434 U.S. 890 (1977). However, in 1975, the District of Columbia Circuit rejected this position in its *Zweibon I* decision, holding that a warrant must be obtained for foreign security wiretaps of domestic groups or persons who are neither agents of nor collaborators with a foreign power—the category of wiretap involved in the present case.⁵²

⁵¹The Court also rejected the government's contention that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510 *et seq.*) recognized and affirmed the President's inherent authority to conduct warrantless national-security wiretaps (407 U.S. at 301-308). Petitioner Mitchell had relied in part on the government's interpretation of Title III in concluding that such warrantless wiretaps were constitutional (II J.A. 178).

⁵²Prior to *Zweibon I*, the District of Columbia Circuit itself had recognized that the law in this area was unsettled. In *United States v. Lemonakis*, 485 F.2d 941 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974), the court observed that the issue of non-domestic national-security wiretaps had been "expressly reserved" in *United States v. United States District Court, supra*, and that this Court had been "at pains to differentiate this activity from" foreign-intelligence surveillance (485 F.2d at 962 & n.31). In addition, the court of appeals, referring to "foreign intelligence gathering * * * as delicate and sensitive" and affecting "fragile international relationships," acknowledged "the significant differences that exist between foreign intelligence opera-

In view of the development of the law in this area, it can scarcely be doubted that, at a minimum, the constitutional standards alleged to have been violated by the Halperin wiretap were not "clearly established" (see page 50, *supra*) during the period the wiretap was in place. And, at least in the absence of a controlling judicial resolution, "each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." *United States v. Nixon*, 418 U.S. 683, 703 (1974). Since the legal principles relied on by respondents involved neither "settled, indisputable law" nor "basic, unquestioned constitutional rights" (see page 51, *supra*), petitioners were entitled to qualified immunity as a matter of law. See also *Chagnon v. Bell*, No. 79-1232 (D.C. Cir. Aug. 14, 1980).

Nevertheless, the court of appeals rejected petitioners' qualified-immunity claim on two grounds. First, without disputing that there was no clearly established warrant requirement for national-security wiretaps before 1972,⁵³ the court of appeals stated that the district court had correctly ruled that the application of the Fourth Amendment's reasonableness requirement to national-security surveillances was "established law" at the time of petitioners' actions in this case (Pet. App. 40a-41a). The district court had concluded that the 21-month duration of the wiretap on respondents' telephone was unreasonable and thus in violation of the Fourth Amendment,⁵⁴ a fact that (according to the court) petitioners Mitchell and

tions and information, on the one hand, and that of the domestic variety, on the other" (*id.* at 963). See also *Chagnon v. Bell*, *supra*, slip op. 17-20.

⁵³The court of appeals remanded to the district court for consideration of petitioners' qualified-immunity defense with respect to their belief that a warrant was not required for a national-security wiretap (see pages 9-10, *supra*). Because petitioners are entitled to immunity as a matter of law, we believe that the Court may appropriately consider the issue at this stage.

⁵⁴The court of appeals applied the same reasoning in the companion cases of *Zweibon v. Mitchell*, 606 F.2d 1172 (D.C. Cir. 1979), petition for cert. pending, Nos. 79-881, 79-883 (filed Dec. 7, 1979), and *Smith*

Haldeman at least should have known (*id.* at 40a).⁵⁵ But neither the district court nor the court of appeals cited any preexisting decisions or statutes to support the conclusion that the length of the challenged wiretap violated "established law." This is understandable because, as discussed above (see pages 51-58, *supra*), there was literally *no* "established law" at the time concerning Fourth Amendment requirements in the context of national-security surveillance.⁵⁶ Indeed, in its 1972 decision in *United States v. United States District Court*, *supra*, the Court noted the distinctive nature of national-security wiretaps and indicated that the reasonableness standard of the Fourth Amendment for such surveillance is necessarily different from that applicable to ordinary criminal investigations (see pages 53-54, *supra*). And even in applying the warrant requirement to domestic national-security wiretaps, the Court declined to specify the governing constitutional standard (see page 54, *supra*). It is thus apparent that there was no "established law" to guide petitioners in the conduct of the surveillance challenged in this case.⁵⁷

v. Nixon, 606 F.2d 1183 (D.C. Cir. 1979), petition for cert. pending, No. 79-882 (filed Dec. 7, 1979), although the wiretaps in those cases were far shorter in duration (six months and three months, respectively).

⁵⁵The district court did not attribute such knowledge to petitioners Nixon and Kissinger, who, after May 1970, were not direct recipients of the wiretap summaries (see page 5, *supra*). The court of appeals rejected their claims of qualified immunity nonetheless, holding that they must "establish their subjective good faith [at trial] as an affirmative defense" (Pet. App. 40a). These petitioners, it bears repeating, had relied on the legal opinion of the Attorney General in authorizing and executing the wiretap.

⁵⁶The courts below also failed to distinguish between the general applicability of the Fourth Amendment reasonableness standard to national-security wiretaps and the content of the reasonableness standard in that context. See, e.g., *United States v. Ramsey*, 431 U.S. 606, 618 n.13 (1977).

⁵⁷Prior to 1972, national-security wiretaps averaged between 78 and 209 days in length. See *United States v. United States District Court*, *supra*, 407 U.S. at 325 (Douglas, J., concurring). See also *United States v. Truong Dinh Hung*, *supra*, slip op. 5 (national-security wiretap continued for 268 days between May 1977 and January 1978).

The court of appeals also suggested that petitioners are not entitled to qualified immunity because the district court had concluded that the wiretap was continued in "bad faith" (Pet. App. 41a). The court of appeals relied in this regard on *Wood v. Strickland*, 420 U.S. 308, 322 (1975), which held that the qualified immunity of a school official would be lost if "he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury * * *." See also, e.g., *Gomez v. Toledo*, No. 79-5601 (May 27, 1980), slip op. 6. The court apparently equated the possibility that the wiretap was continued in "bad faith" with a "malicious intention to cause a deprivation of constitutional rights or other injury."⁵⁸

There are two problems with this aspect of the court of appeals' reasoning. First, the district court did *not* hold that petitioners acted in bad faith. The court ruled instead that, although the continuation of the wiretap violated the reasonableness requirement of the Fourth Amendment, this conduct was not reckless or done with "malicious disregard of [respondents'] rights" (Pet. App. 56a).⁵⁹ It rejected petitioners' claim of qualified immunity on the ground that, "[r]egardless of intention, they violated [respondents'] basic, constitutional right * * * [and] are charged with knowledge of established law" (*id.* at 74a). Accordingly, the district court's decision in this regard does not rest on any finding of subjective malice. Because there was no clearly established law to guide petitioners' conduct, and because they did not act with malicious in-

⁵⁸ It seems obvious, however, that petitioners could not have maliciously intended to deprive respondents of a constitutional right that at the time was not known to exist.

⁵⁹ This finding was made in connection with the district court's determination that punitive damages against petitioners would be unwarranted. Although the standards of malicious intent for punitive damages and for qualified immunity are not necessarily identical, we believe it is most unlikely that the district court would have denied punitive damages here if it had found, as the court of appeals suggested, that petitioners acted in bad faith and with a malicious intent in not terminating the wiretap in this case.

tent, petitioners were entitled to qualified immunity as a matter of law even under the standards of *Wood v. Strickland*. See *Baker v. McCollan, supra*, 443 U.S. at 139; *Procunier v. Navarette, supra*, 434 U.S. at 562; cf. *United States v. Peltier*, 422 U.S. 531, 541-542 (1975).⁶⁰

Moreover, the precise limits of the doctrine of qualified immunity are not the same for all officials, but vary "dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974). It is undisputed that the scope of discretion and breadth of responsibility entrusted to the President, and to the advisors who assist and act for him, differ markedly from those of federal officials generally. The same reasons that support the conclusion that these officials are absolutely immune for their official acts (see pages 25-50, *supra*) also indicate that, if their immunity is only qualified, they should not be required to disprove allegations of "malice" in personal damages actions.

The court of appeals recognized that charges of malice can be easily made and that the necessity of a trial on such claims could seriously disrupt the President's conduct of Office (Pet. App. 47a). Moreover, the conventional doctrine of qualified immunity is entirely inadequate to safeguard the execution of presidential duties (see pages 32-37 and pages 37-38 note 34, *supra*). Because of the special functions performed by the President and the need to avoid undue interference with the responsibilities of his Office in a scheme of separated powers, the President and officials acting for him should be entitled to qualified immunity as a matter of law where their conduct did not ig-

⁶⁰ Insofar as the Court concludes, contrary to this discussion, that the record is inadequate to determine the issue of petitioners' intent, it should remand to the district court for further proceedings. In so doing, however, we believe it would be appropriate, in view of the public policies supporting the doctrine of official immunity, for the Court to set forth the legal standards to be applied on remand. See *Butz v. Economou, supra*, 438 U.S. at 507-508.

nore or defy clearly established constitutional requirements. This application of the qualified-immunity doctrine to the President and his closest advisors would impose a judicial check on intentional misconduct without subjecting them to the possibility of a lengthy and disruptive hearing on allegations of malice that would rarely be sustainable (see Pet. App. 45a).

III. THIS COURT'S DECISION IN *UNITED STATES v. UNITED STATES DISTRICT COURT*, AND LOWER COURT RULINGS AMPLIFYING THAT DECISION, SHOULD NOT BE APPLIED RETROACTIVELY TO CREATE PERSONAL DAMAGES LIABILITY FOR FEDERAL OFFICERS

As discussed above (see pages 51-58, *supra*), the constitutional standards applicable to national-security wiretaps were, at the least, not clearly established during the period the Halperin wiretap was in effect. Nevertheless, the court of appeals in this case (Pet. App. 29a-32a), relying on its decision in the companion case of *Zweibon v. Mitchell*, 606 F.2d 1172 (D.C. Cir. 1979), petitions for cert. pending, Nos. 79-881, 79-883 (filed Dec. 7, 1979) (*Zweibon III*), ruled that petitioners are subject to personal damages liability for their involvement in this surveillance. In so holding, the court has concluded that petitioners are to be held accountable under constitutional norms that simply did not exist at the time. As the Ninth Circuit held in *Weinberg v. Mitchell*, 588 F.2d 275 (1978), this retroactive application of judicial decisions to impose substantive standards of conduct, in the context of a suit for monetary relief against the individual petitioners, is wholly unwarranted.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971), this Court set out the principles governing retroactivity in civil cases:

In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by

overruling clear past precedent on which litigants may have relied *** or by deciding an issue of first impression whose resolution was not clearly foreshadowed ***. Second, it has been stressed that "we must *** weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker*, [381 U.S.] at 629. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano v. City of Houma*, [395 U.S.] at 706.

Each of these factors argues in this case against retroactive application of the requirements developed by the courts long after the termination of the Halperin wiretap.

a. Judicial decisions in this area, rendered after the Halperin wiretap was concluded, presented issues of first impression and were not clearly foreshadowed by prior law. As previously demonstrated, there was at the time of this surveillance no guiding determination of the standards applicable to national-security wiretaps. In 1969, several lower courts held that the President was not required to obtain a judicial warrant for such wiretaps. In early 1971—approximately one month before the end of the Halperin wiretap—the first decisions requiring a warrant for domestic national-security surveillance were issued by district courts. In June 1972—16 months after the Halperin wiretap had been discontinued—this Court held in *United States v. United States District Court* that a warrant was necessary under the Fourth Amendment for domestic national-security wiretaps. In the course of its opinion, however, the Court noted that there had never been "a definitive decision of this Court" on the question (407 U.S. at 299), that the "issue *** [was before the Court] for the first time" (*ibid.*), that "[s]uccessive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees" (*ibid.*), and

that it did "not reject *** lightly" the government's arguments in support of warrantless national-security wiretaps (*id.* at 319).

The Court also noted the special characteristics that distinguished national-security wiretaps from those involved in criminal investigations, but it left open both the precise standards for "domestic" national-security wiretaps and the constitutional requirements for "foreign" national-security surveillance. Following *United States District Court*, several courts held that a warrant was not required in connection with any such foreign security wiretaps. See page 57, *supra*. However, in its 1975 decision in *Zweibon I*, the District of Columbia Circuit reached a different result, ruling that a warrant was constitutionally required where, as in the present case, a foreign security wiretap is placed on a domestic organization or individual who is not acting in concert with a foreign power. Finally, although *United States District Court* and *Zweibon I* had briefly referred to the general Fourth Amendment doctrine of reasonableness for national-security wiretaps, it was not until 1978 that the first court addressed the reasonableness standard specifically applicable to such surveillance.

Against this background, it is clear that *United States District Court* and related decisions involved novel issues of law whose resolution was not clearly foreshadowed. See *Weinberg v. Mitchell*, *supra*, 588 F.2d at 277-278. For the reasons discussed above (see pages 51-58, *supra*), the fact that "the Supreme Court in the late 1960s certainly demonstrated great concern over unrestrained warrantless wiretapping" (*Zweibon III*, *supra*, 606 F.2d at 1178) falls far short of suggesting that the courts would apply Fourth Amendment doctrines developed in the criminal law enforcement area to national-security wiretaps or that, if the doctrines were held applicable, they would be interpreted in the same way.⁶¹ As the Ninth Circuit correctly con-

⁶¹ Even in the law-enforcement context, as the court of appeals itself conceded, "the Fourth Amendment's *** reasonableness standard may vary in different situations" (Pet. App. 19a; footnote omitted).

cluded, *United States District Court* "was quite a step beyond the warrant requirements in *Katz* and other cases." *Weinberg v. Mitchell, supra*, 588 F.2d at 277.

The court of appeals also erred in finding that petitioners' "reliance on prior Executive practice does not bear directly on our determination, since Executive actions cannot represent an authoritative source of constitutional standards" (*Zweibon III, supra*, 606 F.2d at 1179 n.36). To the contrary, "[i]n the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." *United States v. Nixon, supra*, 418 U.S. at 703. See also *Lemon v. Kurtzman*, 411 U.S. 192, 207 (1973) (plurality opinion) ("governments must act [even in the absence of an authoritative judicial decision] if they are to fulfill their high responsibilities"). Similarly, the court of appeals' determination that petitioners were not entitled to rely on lower-court decisions upholding warrantless national-security wiretaps (*Zweibon III, supra*, 606 F.2d at 1179 n.36) is entirely unfounded.

[U]nless we are to hold that parties may not reasonably rely upon any legal pronouncement emanating from sources other than this Court, we cannot regard as blameworthy those parties who conform their conduct to the prevailing statutory or constitutional norm. Cf. *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *Lemon v. Kurtzman*, 411 U.S. 192 (1973).

United States v. Peltier, 422 U.S. 531, 542 (1975) (footnote omitted). See also *Procunier v. Navarette, supra*, 434 U.S. at 565; *Lemon v. Kurtzman, supra*, 411 U.S. at 206; *Chevron Oil Co. v. Huson, supra*, 404 U.S. at 107;

See, e.g., *Marshall v. Barlow's, Inc.* 436 U.S. 307, 320-321 (1978); *United States v. Ramsey*, 431 U.S. 606, 619 (1977); *United States v. Martinez-Fuerte*, 428 U.S. 543, 554-555 (1976); *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968).

Kilgore v. Mitchell, No. 78-2702 (9th Cir. July 22, 1980), slip op. 5.⁶²

b. Retroactivity also will not further the purpose of these intervening constitutional standards. See, e.g., *Lemon v. Kurtzman*, *supra*, 411 U.S. at 201-203. As the Court explained in *United States v. United States District Court*, *supra*, 407 U.S. at 315, 317, the rules governing national-security wiretaps are designed to protect "the needs of citizens for privacy and free expression" and to avoid "potential invasions of privacy and protected speech." Through these requirements, courts have sought to provide "reassurance of the public generally that indiscriminate wiretapping and bugging of law-abiding citizens cannot occur" (*id.* at 321). Thus, these decisions "look[] to a future free from such surveillance." *Weinberg v. Mitchell*, *supra*, 588 F.2d at 278 (emphasis added). While it may be true, as the court of appeals observed (*Zweibon III*, *supra*, 606 F.2d at 1179, 1180 & n.41), that compensation for past wrongs is the underlying rationale for the cause of action recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971),⁶³ that does not suggest in any way that the preventive purpose of *United States District Court* and subsequent decisions such as *Zweibon I* would be promoted by retroactive application in the present case. See *United States v. Peltier*, *supra*, 422 U.S. at 535, 538.⁶⁴

⁶²Indeed, in holding that petitioners were subject to liability for the failure to obtain a warrant, the court of appeals itself relied on a lower-court decision—*Zweibon I*—that has never been approved by this Court.

⁶³See also *Carlson v. Green*, No. 78-1261 (Apr. 22, 1980), slip op. 6; *Butz v. Economou*, 438 U.S. 478, 505 (1978). We note that *Bivens* was decided after the Halperin wiretap had been terminated.

⁶⁴In our view, a different retroactivity question would be presented if, as occurred in this case (see note 14, *supra*), a plaintiff requested relief other than monetary damages. For example, if a plaintiff sought equitable relief ordering the destruction of records obtained from a warrantless wiretap, it is at least arguable that retroactivity would promote the purpose of the judicially-recognized warrant requirement

c. Perhaps most important, it would be seriously inequitable to subject petitioners, by means of a retroactive application of the law, to personal damages liability for failing to conform to constitutional guidelines that did not then exist. In cases involving civil as well as criminal liability, "the notion that persons have a right to fair warning of that conduct that will give rise to * * * [liability] is fundamental to our concept of constitutional liberty." *Marks v. United States*, 430 U.S. 188, 191-192 (1977). See also *Lemon v. Kurtzman*, *supra*, 411 U.S. at 199; *Bouie v. City of Columbia*, 378 U.S. 347, 352-353 (1964). For this reason, retroactivity should especially be avoided where, as here, it would "reach back to disturb or to attach legal consequence to patterns of conduct premised [on existing legal standards]" and would upset the "reliance interests founded upon the old [rule of law]" (411 U.S. at 198). See also *Bradley v. School Board of the City of Richmond*, 416 U.S. 696, 720-721 (1974).⁶⁵ As early as *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) (Marshall, C.J.), this Court "implored the courts to 'struggle hard against a construction which will, by a retrospective operation, affect the rights of parties.'" *Bradley v. School Board of the City of Richmond*, *supra*, 416 U.S. at 717, quoting 5 U.S. (1 Cranch) at 110. In light of these principles, the retroactive creation of a constitutional tort action and the imposition on petitioners of personal liability for conduct that was not wrongful at the time, as the court of appeals has done, "would be as inequitable as *ex post facto* criminal liability * * * [and]

by eliminating any continuing effect on plaintiff's privacy. But where damages are at issue, we do not believe that retroactivity would foster the values to be served by the constitutional standard.

⁶⁵The court of appeals acknowledged that a holding of retroactivity could not be premised here on the notion that "the standards for tort liability probably have little impact on actual conduct." As the court noted, "the standards of the Fourth Amendment were considered [by petitioners], though perhaps incorrectly gauged, in establishing the Government's policy on national security wiretaps" (*Zweibon III*, *supra*, 606 F.2d at 1180).

would be nothing short of punitive." *Weinberg v. Mitchell, supra*, 588 F.2d at 278. See also *Kilgore v. Mitchell*, No. 78-2702 (9th Cir. July 22, 1980), slip op. 9; *Morales v. Hamilton*, 391 F. Supp. 85, 88 (D. Ariz. 1975).

The court of appeals sought to avoid this consideration by noting that "the qualified immunity available to [petitioners for reasonable actions taken in good faith] ensures that no such inequitable result can occur." *Zweibon III, supra*, 606 F.2d at 1181; see also *id.* at 1179 n.38. The court therefore viewed the doctrine of nonretroactivity as "redundant" in light of petitioners' affirmative defense of qualified immunity (*id.* at 1181). But this reasoning overlooks the substantial and fundamental differences between the two concepts. To begin with, nonretroactivity rests on the view that "we cannot regard as blameworthy those parties who conform their conduct to the prevailing *** constitutional norm. Cf. *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *Lemon v. Kurtzman*, 411 U.S. 192 (1973)." *United States v. Peltier, supra*, 422 U.S. at 542. It is a far different matter for the law to exonerate high-ranking federal officials as not blameworthy than to hold that they committed a constitutional tort but are excused from personal liability because their wrongful acts were taken in good faith.

In addition, the doctrine of retroactivity better serves to avoid the unfairness and hardship of burdensome proceedings and unjustified monetary damages. For example, the issue of retroactivity presents a legal question that would be decided by the judge rather than by lay jurors and would be resolved at a pretrial stage without the need for extensive discovery or a trial. In contrast, as the court of appeals explained (Pet. App. 38a-40a), the issue of qualified immunity would generally have to be submitted to the jury at trial, thus subjecting the defendant official to the full onus of litigation and the risk of an erroneous or unprincipled jury decision. Similarly, disposition of these and like cases on the ground of nonretroactivity would promote the development of a coherent and systematic body of law, including appellate review, in a way that is

not possible with respect to jury verdicts on the question of qualified immunity. For these reasons, the court of appeals erred in rejecting the principle of nonretroactivity and relying exclusively on the affirmative defense of qualified immunity to avert the inequity and injustice of personal damages actions against federal officials based on conduct that was not wrongful at the time it occurred.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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