

Supreme Court, U. S.

FILED

AUG 29 1980

No. 79-880

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

HENRY KISSINGER, ET AL., PETITIONERS

v.

MORTON HALPERIN, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

WADE H. McCREE, JR.

Solicitor General

ALICE DANIEL

Assistant Attorney General

KENNETH S. GELLER

Deputy Solicitor General

MARK I. LEVY

Assistant to the Solicitor General

BARBARA L. HERWIG

LARRY L. GREGG

Attorneys

Department of Justice

Washington, D.C. 20530

(202) 633-2217

In the Supreme Court of the United States
OCTOBER TERM, 1979

No. 79-880

HENRY KISSINGER, ET AL., PETITIONERS

v.

MORTON HALPERIN, ET AL.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

QUESTIONS PRESENTED

1. Whether the President and his closest advisors, including the Attorney General, are absolutely immune from personal damages liability for decisions made in the exercise of the President's official authority.
2. Whether these federal officials are entitled to a qualified immunity as a matter of law for authorizing electronic surveillance for national security purposes prior to this Court's decision in *United States v. United States District Court*, 407 U.S. 297 (1972).
3. Whether the Court's decision in *United States v. United States District Court*, and lower court rulings amplifying that decision, should be applied retroactively to create personal damages liability for federal officers.

* Additional petitioners are Richard Nixon, John N. Mitchell, and H.R. Haldeman. Additional respondents are Ina Halperin, David Halperin, Mark Halperin, and Gary Halperin.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	1
Statement	1
Summary of argument	10
Argument	17
I The President and his closest advisors are absolutely immune from personal damages liability for decisions made in the exercise of the President's official authority	17
A. The President of the United States is absolutely immune from civil damages liability based on the conduct of his Office .	18
B. Absolute presidential immunity extends to those who act on the President's behalf at his direction	44
C. Petitioners Kissinger, Mitchell, and Haldeman are entitled to absolute immunity for advising the President on matters within their respective areas of responsibility	47
II. Petitioners are entitled to qualified immunity as a matter of law	50
III. This Court's decision in <i>United States v. United States District Court</i> , and lower court rulings amplifying that decision, should not be applied retroactively to create personal damages liability for federal officers	62
Conclusion	69

TABLE OF AUTHORITIES

Cases:

<i>Alderman v. United States</i> , 394 U.S. 165	52
<i>Ashbrook v. Hoffman</i> , 617 F.2d 474	46
<i>Atlee v. Nixon</i> , 336 F. Supp. 790	33
<i>Baker v. McCollan</i> , 443 U.S. 137	15, 52, 61
<i>Barr v. Matteo</i> , 360 U.S. 564	19, 25, 43, 45
<i>Berger v. New York</i> , 388 U.S. 41	52
<i>Berndtson v. Lewis</i> , 465 F.2d 706	46

III

Cases—Continued:	Page
<i>Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics</i> , 403 U.S. 388	66
<i>Bohmer v. Nixon</i> , Civil No. 75-4-T (S.D. Cal. June 16, 1976)	18, 25
<i>Bouie v. City of Columbia</i> , 378 U.S. 347	67
<i>Bradley v. Fisher</i> , 80 U.S. (13 Wall.) 335	28, 31, 32, 49
<i>Bradley v. School Board of the City of Richmond</i> , 416 U.S. 696	67
<i>Buckley v. Valeo</i> , 424 U.S. 1	45
<i>Butz v. Economou</i> , 438 U.S. 478	<i>passim</i>
<i>Carlson v. Green</i> , No. 78-1261 (Apr. 22, 1980) ...	66
<i>Chagnon v. Bell</i> , 468 F. Supp. 927, aff'd, No. 79-1232 (D.C. Cir. Aug. 14, 1980)	36, 46, 55, 57, 58
<i>Chevron Oil Co. v. Huson</i> , 404 U.S. 97	16, 17, 62, 65
<i>Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.</i> , 333 U.S. 103	38, 39
<i>Clark v. United States</i> , 481 F. Supp. 1086	28
<i>Committee to Establish the Gold Standard v. United States</i> , 392 F. Supp. 504	33
<i>Davis v. Nixon</i> , Civil No. 73-1520-LTL(G) (C.D. Cal. June 18, 1974)	25
<i>Davis v. Passman</i> , 442 U.S. 228	18
<i>District of Columbia v. Carter</i> , 409 U.S. 418	43
<i>Doe v. McMillan</i> , 412 U.S. 306	19, 45, 46
<i>Dombrowski v. Eastland</i> , 387 U.S. 82	37
<i>Eastland v. United Staes Servicemen's Fund</i> , 421 U.S. 491	18, 32, 36, 43, 45
<i>Elrod v. Burns</i> , 427 U.S. 347	44
<i>Farnsworth Cannon, Inc. v. Grimes</i> , No. 79-1260 (4th Cir. June 12, 1980)	35
<i>Ferri v. Ackerman</i> , 444 U.S. 193	27
<i>Fonda v. Nixon</i> , Civil No. 73-2442-MML (C.D. Cal. May 23, 1974)	18, 25
<i>Forsyth v. Kleindienst</i> , 599 F.2d 1203, petition for cert. pending, No. 79-1120	46, 50
<i>Giordano v. United States</i> , 394 U.S. 310.....	52, 53, 55
<i>Gomez v. Toledo</i> , No. 79-5601 (May 27, 1980)	36, 60
<i>Gravel v. United States</i> , 408 U.S. 606	13, 19, 45
<i>Green v. DeCamp</i> , 612 F.2d 368	46

Cases—Continued:

	Page
<i>Gregoire v. Biddle</i> , 177 F.2d 579, cert. denied, 339 U.S. 949	27, 28, 36, 41
<i>Hanrahan v. Hampton</i> , No. 79-912 (June 2, 1980)	37
<i>Heine v. Raus</i> , 399 F.2d 785	46
<i>Herbert v. Lando</i> , 441 U.S. 153	36
<i>Hirabayashi v. United States</i> , 320 U.S. 81	31
<i>Hutchinson v. Proxmire</i> , 443 U.S. 111	37
<i>Imbler v. Pachtman</i> , 424 U.S. 409	11, 12, 26, 28, 31, 32, 35, 36, 43
<i>Johnson v. Alldredge</i> , 488 F.2d 820, cert. denied, 419 U.S. 882	46
<i>Katz v. United States</i> , 389 U.S. 347	52, 53, 55
<i>Kendall v. United States</i> , 37 U.S. (12 Pet.) 524 ...	33
<i>Kermit Construction Corp. v. Banco Credito Y Ahorro Poncenio</i> , 547 F.2d 1	46
<i>Kilgore v. Mitchell</i> , No. 78-2702 (9th Cir. July 22, 1980)	55, 66, 68
<i>Korematsu v. United States</i> , 323 U.S. 214	31
<i>Lake Country Estates, Inc. v. Tahoe Regional Planning Agency</i> , 440 U.S. 391	35
<i>Lemon v. Kurtzman</i> , 411 U.S. 192	65, 66, 67
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137	19
<i>Marks v. United States</i> , 430 U.S. 188	17, 67
<i>Marshall v. Barlow's, Inc.</i> , 436 U.S. 307	65
<i>Marshall v. Gordon</i> , 243 U.S. 521	30
<i>Mellon v. Brewer</i> , 18 F.2d 168, cert. denied, 275 U.S. 530	25-26
<i>Meyers v. Nixon</i> , 339 F. Supp. 1388	33
<i>Milligan, Ex parte</i> , 71 U.S. (4 Wall.) 2	31
<i>Mississippi v. Johnson</i> , 71 U.S. (4 Wall.) 475	33
<i>Morales v. Hamilton</i> , 391 F. Supp. 85	68
<i>Myers v. United States</i> , 272 U.S. 52	26, 45
<i>National Treasury Employees Union v. Nixon</i> , 492 F.2d 587	42
<i>New York Times Co. v. United States</i> , 403 U.S. 713	38, 39
<i>Nixon v. Administrator of General Services</i> , 433 U.S. 425	18, 29

Cases—Continued:	Page
<i>Nixon v. Fitzgerald</i> , petition for cert. pending, No. 79-1738 (filed May 2, 1980)	28, 38
<i>Nixon v. Sirica</i> , 487 F.2d 700	30, 42
<i>O'Connor v. Donaldson</i> , 422 U.S. 563	51
<i>Owen v. City of Independence, Missouri</i> , No. 78- 1779 (Apr. 16, 1980)	51
<i>Pierson v. Ray</i> , 386 U.S. 547	28, 43, 50, 51
<i>Procunier v. Navarette</i> , 434 U.S. 555	14, 51, 61, 65
<i>Reese v. Nixon</i> , 347 F. Supp. 314, aff'd in perti- nent part, No. 72-3070 (9th Cir. May 3, 1974) ..	25
<i>San Francisco Redevelopment Agency v. Nixon</i> , 329 F. Supp. 672	33
<i>Scheuer v. Rhodes</i> , 416 U.S. 232	16, 42, 61
<i>Scott v. United States</i> , 436 U.S. 128	55
<i>Sinking-Fund Cases</i> , 99 U.S. 700	18
<i>Smith v. Nixon</i> , 606 F.2d 1183, petition for cert. pending, No. 79-882	58-59
<i>Snepp v. United States</i> , Nos. 78-1871, 79-265 (Feb. 19, 1980)	39
<i>Spaulding v. Nielsen</i> , 599 F.2d 728	46
<i>Stump v. Sparkman</i> , 435 U.S. 349	18, 28, 31, 43, 49
<i>Supreme Court of Virginia v. Consumers Union of the United States, Inc.</i> , No. 79-198 (June 2, 1980)	18, 36, 37, 43
<i>Suskin v. Nixon</i> , 304 F. Supp. 71	33
<i>Taglianetti v. United States</i> , 394 U.S. 316	52
<i>Tenney v. Brandhove</i> , 341 U.S. 367	32, 35, 36, 37
<i>Terry v. Ohio</i> , 392 U.S. 1	65
<i>Totten v. United States</i> , 92 U.S. (2 Otto) 105	39
<i>Trimble v. Johnston</i> , 173 F. Supp. 651	33
<i>United States v. Brewster</i> , 408 U.S. 501	29, 31, 43
<i>United States v. Brown</i> , 484 F.2d 418, cert. de- nied, 415 U.S. 960	57
<i>United States v. Buck</i> , 548 F.2d 871, cert. denied, 434 U.S. 890	57
<i>United States v. Burr</i> , 25 Fed. Cas. 30	42
<i>United States v. Butenko</i> , 318 F. Supp. 66, aff'd, 494 F.2d 593, cert. denied, 419 U.S. 881	56, 57

Cases—Continued:	Page
<i>United States v. Clay</i> , Cr. No. 67 H 94 (S.D. Tex. July 14, 1969), aff'd, 430 F.2d 165, rev'd on other grounds, 403 U.S. 698	56
<i>United States v. Curtiss-Wright Export Corp.</i> , 299 U.S. 304	37, 39, 40, 42
<i>United States v. Dellinger</i> , No. 69 CR 180 (N.D. Ill. Feb. 20, 1970)	56
<i>United States v. Doe</i> , 455 F.2d 753	45
<i>United States v. Enten</i> , 388 F. Supp. 97, aff'd on other grounds <i>sub nom. United States v. Lemonakis</i> , 485 F.2d 941, cert. denied, 415 U.S. 989	56, 57
<i>United States v. Gillock</i> , No. 78-1455 (Mar. 19, 1980)	18
<i>United States v. Helstoski</i> , 442 U.S. 477	18
<i>United States v. Humphrey</i> , 456 F. Supp. 51, aff'd in pertinent part <i>sub nom. United States v. Truong Dinh Hung</i> , Nos. 78-5176, 78-5177 (4th Cir. July 17, 1980)	54-55, 59
<i>United States v. Isaacs</i> , 493 F.2d 1124, cert. denied, 417 U.S. 976	30
<i>United States v. Johnson</i> , 383 U.S. 169	18, 31
<i>United States v. Lee</i> , 106 U.S. (16 Otto) 196	43
<i>United States v. Lyttle</i> , Cr. No. 58942-71 (D.C. Super. Ct. Jan. 12, 1972)	56
<i>United States v. Martinez-Fuerte</i> , 428 U.S. 543	65
<i>United States v. Nixon</i> , 418 U.S. 683	<i>passim</i>
<i>United States v. O'Baugh</i> , 304 F. Supp. 767	56
<i>United States v. O'Neal</i> , No. KC-CR-1204 (D. Kan. Sept. 1, 1970)	56
<i>United States v. Peltier</i> , 422 U.S. 531	61, 65, 66, 68
<i>United States v. Ramsey</i> , 431 U.S. 606	59, 65
<i>United States v. Reynolds</i> , 345 U.S. 1	34
<i>United States v. Schooner Peggy</i> , 5 U.S. (1 Cranch) 103	67
<i>United States v. Sinclair</i> , 321 F. Supp. 1074	56
<i>United States v. Smith</i> , 321 F. Supp. 424	56
<i>United States v. United States District Court</i> , 407 U.S. 297	<i>passim</i>

Cases—Continued:	Page
<i>Weinberg v. Mitchell</i> , 588 F.2d 275	16, 17, 62, 64 65, 66, 68
<i>Wood v. Strickland</i> , 420 U.S. 308	15, 51, 52, 60, 61
<i>Yaselli v. Goff</i> , 275 U.S. 503, aff'g 12 F.2d 396 ...	31
<i>Youngstown Sheet & Tube Co. v. Sawyer</i> , 343 U.S. 579	31
<i>Zweibon v. Mitchell</i> , 516 F.2d 594, cert. denied, 425 U.S. 944	54
<i>Zweibon v. Mitchell</i> , 606 F.2d 1172, petitions for cert. pending, Nos. 79-881, 79-883 ...	9, 50, 58, 62, 64, 65, 66, 67, 68
 Constitution, statutes and rule:	
United States Constitution:	
Art. I, § 3	30
Art. I, § 6	30-31
Art. I, § 7	23
Art. I, § 8	23
Art. II	10, 17, 18, 19, 32
Art. II, § 1	12, 20, 26, 29
Art. II, § 2	14, 23, 48, 49
Fourth Amendment	<i>passim</i>
Federal Communications Act of 1934, Section 605, 47 U.S.C. (1964 ed.) 605	56
Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783	30
Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510, <i>et seq.</i>	7, 57
18 U.S.C. 2511	10
18 U.S.C. 2520	10
War Powers Resolution, 50 U.S.C. 1541 <i>et seq.</i>	30
28 U.S.C. 511.....	49
42 U.S.C. 1983	42
Fed. R. Civ. P. 37(b).....	37
 Miscellaneous:	
10 Annals of Cong. (1800).....	24
Brownell, <i>The Public Security and Wire Tapping</i> , 39 Cornell L.Q. 195 (1954).....	55
Comment, <i>Spying and Slanderizing: An Absolute Privilege for the CIA Agent?</i> , 67 Colum. L. Rev. 752 (1967)	46

Miscellaneous—Continued:	Page
Cutler & Johnson, <i>Regulation and the Political Process</i> , 84 Yale L.J. 1395 (1975)	43
<i>Dr. Kissinger's Role in the Wiretapping of Certain Government Officials and Newsmen: Hearings Before the Senate Comm. on Foreign Relations</i> , 93d Cong., 2d Sess. (1974)	7
II J. Elliot, <i>The Debates in the Several State Conventions on the Adoption of the Federal Constitution</i> (1836)	22
M. Farrand, <i>The Records of the Federal Convention of 1787</i> (rev. ed. 1966):	
Vol. II	21, 40, 48
Vol. IV	40
<i>The Federalist</i> (1914 ed.):	
No. 64 (J. Jay)	40
No. 69 (A. Hamilton)	21, 44
No. 70 (A. Hamilton)	21, 22, 40
No. 71 (A. Hamilton)	21
No. 74 (A. Hamilton)	48
No. 75 (A. Hamilton)	40
No. 77 (A. Hamilton)	23
<i>Final Report of the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities</i> , S. Rep. No. 94-755, 94th Cong., 2d Sess. (1976)	7, 30
Book I	2
Book III	3
Book VI	2
<i>Hearings on H.R. 5386 Before Subcomm. No. 5 of the House Comm. on the Judiciary</i> , 90th Cong., 1st Sess. (1967)	53
H.R. Rep. No. 93-1305, 93d Cong., 2d Sess. (1974)	7, 30
W. Maclay, <i>Sketches of Debate in the First Senate of the United States</i> (Harris ed. 1880)	20
<i>Restatement (Second) of Agency</i> (1958)	46
I J. Richardson, <i>Messages and Papers of the Presidents</i> (1896)	40
Rogers, <i>The Case for Wire Tapping</i> , 63 Yale L.J. 792 (1954)	55
<i>Statement of Information, Committee on the Judiciary of the House of Representatives</i> , 93d Cong., 2d Sess. (1974)	7

Miscellaneous—Continued:	Page
J. Story, <i>Commentaries on the Constitution of the United States</i> (1833 ed.):	
Vol. II.....	30
Vol. III.....	20, 23, 40, 48
<i>Warrantless Wiretapping and Electronic Surveillance—1974: Joint Hearings Before the Subcomm. on Administrative Practice and Procedure and the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary and the Subcomm. on Surveillance of the Senate Comm. on Foreign Relations</i> , 93d Cong., 2d Sess. (1974)	5
II D. Watson, <i>The Constitution of the United States</i> (1910).....	28, 36, 48
<i>The Works of James Wilson</i> (Andrews ed. 1896):	
Vol. I.....	22
Vol. II.....	22

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-53a) is reported at 606 F.2d 1192. The opinions of the district court (Pet. App. 54a-59a, 60a-77a) are reported at 424 F. Supp. 838 and 434 F. Supp. 1193.

JURISDICTION

The judgment of the court of appeals (Pet. App. 78a-79a) was entered on July 12, 1979. On October 2, 1979, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 9, 1979. The petition for a writ of certiorari was filed on December 7, 1979, and was granted on May 19, 1980 (I J.A. 355). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are set out in the petition at pages 2-4.

STATEMENT

1. Between February and April of 1969, President Richard Nixon and several of his top advisors became increasingly concerned about unauthorized disclosures to the press of certain foreign policy documents and classified information. The information that was being improperly divulged revealed the internal formulation of foreign policy on several important and sensitive issues, including strategic arms limitations talks then under way with the Soviet Union, peace proposals for the Middle East, the termination of our military involvement in Vietnam, and the return of the island of Okinawa to Japanese control (I J.A. 218-222, 309-310; II J.A. 9-10, 13-14). The President and his advisors believed that the untimely release of this classified information would seriously jeopardize the gov-

ernment's foreign policy initiatives in these areas (I J.A. 310).¹ They also believed that a likely source of these leaks was personnel at the National Security Council ("NSC") because the leaked information included certain statements made during confidential discussions within that agency (I J.A. 318-321). Between February 3 and April 25, 1969, there occurred in the public press more than 16 disclosures of highly classified information either from NSC files or dealing with NSC matters (I J.A. 319-320; II J.A. 15).²

Accordingly, on April 25, 1969, President Nixon met with Attorney General John N. Mitchell, NSC Director Henry Kissinger, and FBI Director J. Edgar Hoover to discuss methods for controlling these breaches of security. Director Hoover informed President Nixon that electronic surveillance, including wiretaps, was an effective method of determining the source of leaks and had been used by previous administrations for similar reasons (I J.A. 223,

¹ Administration officials were concerned that these leaks, in addition to disseminating classified information, might raise serious questions about the United States' credibility and reliability in dealing with foreign governments on a confidential basis and might serve to inhibit critical discussions and vigorous debate within the Executive Branch itself (I J.A. 220, 222; II J.A. 17, 23, 75). For example, because of the position of the Cambodian government, the continuation of bombing missions against North Vietnamese sanctuaries in Cambodia depended upon strict secrecy (II J.A. 18, 26; see also pages 3-4, *infra*). Similarly, the initiation of relations with the Peoples Republic of China also hinged on preserving the secrecy of negotiations (II J.A. 37-38).

²The National Security Council was originally established in 1947. After a reorganization by President Truman in 1950, the NSC was extensively used by President Eisenhower in the formulation of national defense and foreign policy. Although the Council occupied a much lesser role in the Kennedy and Johnson administrations, it returned to a position of importance under President Nixon. See S. Rep. No. 94-755, 94th Cong., 2d Sess., Book I at 42, Book VI at 244-250 (1976). President Johnson cautioned President Nixon about reviving the NSC as a major policy-making body because of a concern over the possibility of leaks (II J.A. 10-11, 82-83), and President Eisenhower, while supporting the action, also expressed serious concern regarding NSC leaks (II J.A. 13-14).

315, 325-326; II J.A. 15-17, 34, 141-142, 216).³ Attorney General Mitchell advised the President that the use of wiretaps to discover the source of the leaks would be legal (I J.A. 223, 315, 326; II J.A. 17, 34, 62, 178-183, 190, 216).

President Nixon thereupon authorized a program of electronic surveillance and adopted three criteria to identify individuals who would be investigated: (a) access to classified material that had been leaked; (b) unfavorable information in the individual's security file; and (c) FBI investigations that listed the individual as a potential source of leaked information (I J.A. 48-49, 212-213, 326; II J.A. 16-17, 20, 45, 209-211, 218, 231-232). At the President's direction, Dr. Kissinger prepared a list of officials who had access to leaked information (I J.A. 48-49, 223, 317; II J.A. 19-20, 28, 62, 211). Morton Halperin, Chief of the NSC Planning Group, was on that list (I J.A. 223-224).⁴

Serious leaks from or pertaining to the NSC continued in late April and early May of 1969, and at least four more such leaks appeared in the news media between April 27 and May 6 (I J.A. 320; II J.A. 15). On May 9, 1969, an article was published in the *New York Times* that contained classified information concerning United States' bombing missions against North Vietnamese sanctuaries in Cambodia (I J.A. 220; II J.A. 18, 27). This disclosure of extremely sensitive information caused the leadership of Cambodia to denounce the bombing and prompted the dis-

³President Johnson had previously told President Nixon that he had employed wiretaps in national-security cases and considered their use to be legal (II J.A. 34). See S. Rep. No. 94-755, *supra*, Book III at 321-323; see also *id.* at 328-330.

⁴In this capacity, Dr. Halperin had access to highly confidential information on major policy issues during this period. Among other things, Halperin attended NSC Review Group meetings on such subjects as the United States' strategic posture, the SALT negotiations, and the war in Vietnam, and received various confidential intelligence reports and limited distribution cables on the war in Vietnam and the Paris peace negotiations (I J.A. 223-224).

continuance of that military operation (II J.A. 18-19, 26-27).⁵ At the President's request, Dr. Kissinger called Director Hoover and asked him to investigate the source of the security leak (I J.A. 170, 336-337; II J.A. 19, 27, 218-219). Several hours later, Hoover called Kissinger to inform him that Halperin was a likely source (I J.A. 171-175; II J.A. 222-223, 227-228), and a wiretap was installed on Halperin's home telephone that evening (I J.A. 46, 61, 82-83).⁶ Acting pursuant to the President's authorization, Attorney General Mitchell formally approved the wiretap on May 12, 1969 (I J.A. 82-83, 175-177; II J.A. 159-160).

In authorizing the surveillance, President Nixon indicated that the wiretaps should be limited to those circumstances that truly involved the national security and required the use of electronic surveillance (II J.A. 17, 19, 21, 23, 44, 45, 49, 58) and that the wiretaps should be terminated as soon as they were no longer necessary (I J.A. 182; II J.A. 44, 45, 58, 92). Neither the President nor the Attorney General believed it necessary to give specific instructions concerning the actual operation of the investigation; such matters of detail were left to Director Hoover as the expert in the area, and they presumed that he would observe all applicable Department of Justice procedures (II J.A. 28-29, 42-44, 48-49, 61-63, 134, 183-184).⁷ Petitioners Kissinger and Haldeman also assumed that the FBI would comply with established legal requirements (II J.A. 213, 269-271, 304).

⁵This leak was of particular concern because the information disclosed in the article had been held on a strict need-to-know basis and had not yet even been discussed at an open NSC meeting (II J.A. 19).

⁶Dr. Halperin was selected for surveillance on the grounds that Director Hoover had identified Halperin at the April 25 meeting as having unfavorable information in his security file, that Dr. Kissinger had included Halperin's name on the list of key NSC personnel with access to leaked information, and that Hoover had advised Kissinger on May 9 that a preliminary investigation showed Halperin to be a principal suspect regarding the leaks (I J.A. 172-175, 223-224, 326, 327; II J.A. 120, 210-211, 214, 216-218, 222-223, 228, 230-231).

⁷On May 6, 1969, Attorney General Mitchell had promulgated procedures to be observed by the Department of Justice in cases of war-

Because the success of the investigation depended on secrecy, and because disclosure would have had a detrimental effect on the morale of those working in the new administration and on relations with foreign governments (II J.A. 17, 23), the President directed that the investigation be "closely held" (II J.A. 43). In accordance with this direction, Director Hoover decided that only one master copy of the surveillance logs would be maintained and that surveillance materials would not be kept in the general files of the FBI (Sullivan Dep. 42-43). Summaries of information obtained through the investigation were prepared and sent to the White House for the President and Dr. Kissinger (I J.A. 225; Sullivan Dep. 42-43; Haig Dep. 41-43).⁸ On occasion, copies of the summaries were also sent to the Department of Justice for Attorney General Mitchell (I J.A. 249, 264; II J.A. 162). The summaries were generally handled by the staff in these offices and only rarely, if ever, were they read personally by the President, the Attorney General, or the NSC Director (II J.A. 50-53, 84, 100, 162-164, 166-167, 170-171, 213, 238, 246-247, 248-249). In May 1970, this system of distribution was modified to have the summaries sent to H.R. Haldeman, Assistant to the President, who would bring pertinent information to the attention of the President and

warrantless national-security wiretaps. The Attorney General's directive provided that initial and renewal applications for such wiretaps contain specified information justifying the surveillance and that extensions beyond 90 days be approved in writing by the Attorney General (Pet. App. 7a n.22, 68a-69a n.6; I J.A. 161-164; II J.A. 133-138). Compare *Warrantless Wiretapping and Electronic Surveillance—1974: Joint Hearings Before the Subcomm. on Administrative Practice and Procedure and the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary and the Subcomm. on Surveillance of the Senate Comm. on Foreign Relations*, 93d Cong., 2d Sess. 70 (1974) (statement of former Attorney General Ramsey Clark) (quarterly accounting of electronic surveillance but no renewal requirement).

⁸ Initially, these summaries were reviewed by Dr. Kissinger's aide, General Alexander Haig, at the office of Assistant FBI Director William C. Sullivan (Haig Dep. 17-23; Sullivan Dep. 53-54). Beginning on May 28, 1969, the summaries were distributed to the White House.

Dr. Kissinger (I J.A. 225, 232, 251, 264, 343-344; II J.A. 78-79, 295-296).⁹

Despite the administration's efforts to maintain the integrity of confidential information, the problem of leaks persisted throughout the period 1969-1971, with "serious adverse effects upon our national security and our relations with our allies" (I J.A. 224-225).¹⁰ While the wiretaps continued, Dr. Halperin resigned his full-time position with the National Security Council in September 1969 and his position as a consultant to the NSC in May 1970 (I J.A. 223; II J.A. 85).¹¹ Because the continuing surveillance failed to reveal that Halperin was the source of the leaks, the wiretap was removed from his phone on February 10, 1971 (I J.A. 211).

2. The existence of this wiretap was disclosed during the trial of Daniel Ellsberg in May 1973 (I J.A. 48). After learning of the wiretap, Dr. Halperin and his wife and children (the respondents) filed this action in the United States District Court for the District of Columbia, alleging that the wiretap was unlawful under the Fourth Amend-

⁹This change in distribution resulted from Director Hoover's view that the summaries were available to too many people and from Dr. Kissinger's request that the summaries no longer be sent to his office in light of his increasing workload as National Security Advisor and his need to deal on a daily basis with those who were under surveillance (II J.A. 78-79, 295-296). Haldeman was selected to receive the summaries and coordinate the information because, as the President's closest aide, "he was totally privy to all of [the administration's] major foreign policy issues" (II J.A. 79).

¹⁰In October 1969 (I J.A. 190-191) and December 1970 (I J.A. 207-208), the President issued memoranda to Cabinet officers and other ranking administration officials regarding the problem of leaks and the necessity to curb such unauthorized disclosures of confidential information.

¹¹When Dr. Halperin left the NSC, he removed, without approval, several boxes of highly classified and sensitive NSC studies and memoranda, including materials entitled "Strategic Arms Limitations Talks, Basic Book," "Strategic Missile Talks," "Vietnam Negotiations," "Vietnam Options 1969," "Vietnam Bombing," and "Major Security Issues" (I J.A. 307). And, of course, Halperin did not expunge from his memory the confidential information he had learned while employed at the NSC (II J.A. 91).

ment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* The suit was brought against petitioners and other federal officers¹² and sought monetary damages and declaratory and injunctive relief.

After extensive discovery (Pet. App. 28a n.85, 65a, 70a),¹³ the district court granted petitioners' motion for summary judgment on the Title III claims. The court stated that "[i]nterpretation of this statute and of the President's domestic power thereunder" was entirely unsettled prior to *United States v. United States District Court*, 407 U.S. 297 (1972), and that petitioners "should not be held to have acted at their peril in this vacuum," especially in light of "the 30-year history of similar Executive actions" (Pet. App. 66a). The court thus held that

¹² In addition to petitioners Kissinger, Nixon, Mitchell, and Halderman, the complaint sought damages from defendants John Ehrlichman, Alexander Haig, William Sullivan, Robert Mardian, Jeb Stuart Magruder, and the Chesapeake and Potomac Telephone Company; FBI Director Kelley was also named as a defendant for purposes of equitable remedies. The district court granted summary judgment in favor of the defendants against whom monetary relief was sought (Pet. App. 74a-77a). The district court also awarded summary judgment to Kissinger because of his "inactive role [in the wiretap] and the lack of oversight authority" (*id.* at 75a).

¹³ Respondents engaged in voluminous discovery in this case. They took 22 depositions totalling more than 1,900 pages and were given broad access to a great many documents, including petitioners' personal logs and appointment books, internal government memoranda concerning both the Halperin wiretap and the general policies and procedures for electronic surveillance, and White House tapes. Respondents also had available the information developed during several congressional investigations relevant to this wiretap. See *Final Report of the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities*, S. Rep. No. 94-755, 94th Cong., 2d Sess. (1976) (Church Committee); *Dr. Kissinger's Role in the Wiretapping of Certain Government Officials and Newsmen: Hearings Before the Senate Comm. on Foreign Relations*, 93d Cong., 2d Sess. (1974); *Statement of Information, Committee on the Judiciary of the House of Representatives*, 93d Cong., 2d Sess. (1974); H.R. Rep. No. 93-1305, 93d Cong., 2d Sess. 146-150 (1974) (Judiciary Committee report on evidence from impeachment inquiry into wiretap program). See also Pet. App. 70a-72a nn.7-12.

petitioners had a "reasonable" and "good faith belief" that "Title III was inapplicable to the Halperin wiretap" and that "[respondents] have no cause of action under Title III" (*id.* at 66a-67a).

With respect to respondents' constitutional claims, however, the district court concluded that the wiretap constituted an unreasonable search in violation of the Fourth Amendment. The court recognized that "[t]here was justifiably grave concern in early 1969 over the leaking of confidential foreign policy information," that such leaks "could reasonably be viewed as impeding progress and affecting policy-makers' discussions in [several] areas [of foreign policy]," and that, as "determined by the highest Executive officials * * * [pursuant to] [s]pecific criteria[,] * * * [a] limited number of persons were subjected to * * * electronic surveillance, many for a relatively short time" (Pet. App. 68a). Nevertheless, it held that, "even granting the inapplicability of the general warrant requirement," the wiretap of respondents' telephone was constitutionally unreasonable because it continued for 21 months without an effort to minimize the number or type of conversations overheard (*id.* at 68a-70a). On this basis, the court imposed liability upon "former President Nixon, for having initiated and overseen the program without any temporal or informational limits on the surveillance; Attorney General Mitchell, for having failed to carry out review and renewal obligations during the entire twenty-one month surveillance period; [and] H.R. Haldeman, for having reviewed the wiretap material for over a year without recommending termination and for having disseminated the material for purposes unrelated to the tap's original justification" (*id.* at 73a).

The district court also determined that the President, the Attorney General, and the other petitioners were not entitled to an absolute immunity from damages liability for authorizing an electronic surveillance in violation of the Fourth Amendment (Pet. App. 70a & n.8, 73a). Furthermore, although it found that petitioners' conduct "cannot fairly be characterized as a wanton, reckless or malicious disregard of [respondents'] rights" (*id.* at 56a),

the court held that petitioners were not entitled to a qualified good-faith immunity from damages liability because “their activities relating to the wiretap continuance [were] unreasonable and in violation of established Fourth Amendment rights” (*id.* at 73a) and because they “are charged with knowledge of established law” (*id.* at 74a). Since respondents did not establish any actual injury from the wiretap, however, the court awarded only nominal damages of one dollar (*id.* at 56a).¹⁴

3. The court of appeals reversed the judgment of the district court and remanded for further proceedings. 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), the court held that the Fourth Amendment requirement of a warrant for electronic surveillance in national-security cases would be applied retroactively to establish a cause of action in damages (Pet. App. 30a). In addition, the court concluded that petitioners’ failure to terminate the surveillance within a reasonable period of time constituted a violation of the Fourth Amendment that also gave rise to a damages action (*id.* at 29a-32a). Finally, the court of appeals agreed with the district court that (i) the President and his closest advisors (including the Attorney General) are not entitled to absolute immunity with respect to their authorization and implementation of the surveillance, and (ii) petitioners are not entitled to qualified immunity as a matter of law with respect to the continuation of the surveillance because “there were no reasonable grounds for believing that the continuing surveillance was in accord with the Constitution” (*id.* at 41a).¹⁵ The court remanded

¹⁴The district court also ordered petitioners to insert certain exonerating materials into respondent Morton Halperin’s security file and enjoined petitioners from making any use of the intercepted communications (Pet. App. 57a-59a). These portions of the court’s judgment were not appealed, and therefore the only remaining issues in this case concern petitioners’ personal liability for money damages.

¹⁵The court of appeals also suggested that the district court had found that the wiretap was continued in bad faith (Pet. App. 41a). As discussed below (pages 60-61, *infra*), however, we believe that the district court made no such finding.

the case to the district court to determine when the continuation of the wiretap became unreasonable and whether petitioners acted in good faith in authorizing a warrantless electronic surveillance for national security purposes prior to this Court's decision in *United States v. United States District Court*, *supra* (*id.* at 29a, 31a).¹⁶

SUMMARY OF ARGUMENT

I.

A.

The courts below have held, for the first time since the founding of the Republic, that the President of the United States is subject to personal damages liability for official acts taken in his capacity as the Nation's Chief Executive. This unprecedented ruling is contrary to both the historical understanding of the absolute immunity inherent in the Office of the President under Article II of the Constitution and the compelling reasons of public policy in favor of such a privilege for the President. In light of the principle of separation of powers and the "special functions" of the

¹⁶ In addition, the court of appeals remanded respondents' statutory claims for a determination whether, as respondents asserted, the primary purpose of the surveillance was not to "protect[] national security information against foreign intelligence activities" (Pet. App. 28a). The court held that if some other purpose primarily was intended, petitioners' failure to obtain a warrant would subject them to damages liability under Title III (18 U.S.C. 2511, 2520) (Pet. App. 27a-28a). We have not sought review of this portion of the court of appeals' judgment because we believe that the district court already has determined that the primary purpose of the surveillance was the protection of national security information (*id.* at 61a-62a, 68a) and that any proceedings on remand would support that ruling.

The court of appeals also held that respondents should be awarded more than nominal damages if they can establish emotional distress or other intangible injury (Pet. App. 33a-35a). Finally, the court of appeals reversed the award of summary judgment in favor of Dr. Kissinger, holding that there were genuine issues of material fact concerning his role in the installation and maintenance of the wiretap (*id.* at 49a-50a). We have not sought review of these issues.

presidency (*Butz v. Economou*, 438 U.S. 478, 508 (1978)), an absolute immunity is necessary "to protect the decisionmaking processes of [the President]" (*id.* at 503) and "is essential for the conduct of the public business" (*id.* at 507). Accordingly, this Court should reject the lower courts' unwarranted assertion of judicial authority in personal damages suits to engage in routine oversight of the President's official acts.

It has long been recognized that the President is not personally accountable in judicial proceedings for the exercise of his executive powers. The Framers of the Constitution, after extensive consideration focusing specifically on the Office of the President, concluded that possible excesses of presidential authority would be restrained by the power of impeachment, the political constraints of the election process and public opinion, and the system of checks and balances. Nothing in their deliberations suggested in any way that the President would be liable to suit for money damages arising out of the conduct of his Office.

In line with these authorities, few litigants have ever attempted to sue the President for monetary relief. And, on those infrequent occasions when such litigation has been commenced, the federal courts have consistently ruled that the President cannot be held personally accountable for damages.

The doctrine that the President is absolutely immune from personal damages liability for his official acts also rests on sound reasons of public policy and serves to ensure the fundamental separation of governmental powers. Most importantly, the risk of personal liability would inhibit the fearless and decisive exercise of presidential authority, and "the public trust [placed in the President] would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Imbler v. Pachtman*, 424 U.S. 409, 424–425 (1976). As the Nation's Chief Executive, the President is repeatedly called upon to make discretionary decisions on controversial issues that affect the lives of virtually every American. Especially in the critical

areas of national defense and foreign affairs, the President's discharge of these "grave, complex and unique responsibilities" (Pet. App. 53a (Gesell, J., concurring)) should be motivated solely by considerations of the public welfare, not by fear of damages awards.

Moreover, the President is a natural target for those dissatisfied by the outcome of his decisions. The matters that come to the attention of the President are likely to "arouse the most intense feelings" (*Butz v. Economou, supra*, 438 U.S. at 509 n.36), and it is all too easy for disgruntled individuals or groups, simply by alleging an "unconstitutional animus" (*id.* at 512), to carry their disagreement from the political arena into the courtroom.

Finally, successful damages suits against the President would be quite rare, and there exist means wholly apart from such litigation—the power of impeachment and the availability of subsequent criminal prosecution, the system of checks and balances, the electoral process and the force of public opinion, and the availability of judicial review of executive actions—to deter the improper exercise of presidential authority. These considerations have special bearing with respect to the President, in light of the express constitutional delegation to him of the full "executive Power *** of the United States" (Art. II, § 1), the prominence and visibility of his Office, his status as the only elected official in the Executive Branch of the federal government, and his traditional role as the leader of his political party.

By the same token, it is evident that a qualified immunity would be seriously inadequate to protect the "public interest *** [in the] vigorous and fearless performance of the *** [President's] duty." *Imbler v. Pachtman, supra*, 424 U.S. at 427. 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 by requiring the President to explain and justify his decisions in response to civil damages suits. Indeed, in order to sustain his claim of qualified immunity, the President would generally be

forced to reveal not only the intimate details of constitutionally privileged executive decision-making (*United States v. Nixon*, 418 U.S. 683 (1974)), but also the confidential and often highly sensitive information on which he based his acts. It may also be impossible to convey to a lay jury several years later, in the aftermath of subsequent national events and possible political passions, the complexity, gravity, and urgency of controversial presidential decisions—especially decisions (as in this case) in the areas of national security and foreign affairs. Finally, the burdens of such litigation—the time, the expense, the personal anxiety, and the unavoidable distraction from official duties—should not be imposed upon the President.

B.

Absolute presidential immunity should extend to those who act on the President's behalf at his direction. 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. “[T]he 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 *** if they are not so recognized, the central role of the *** [absolute presidential immunity] will inevitably be diminished and frustrated.” *Gravel v. United States*, 408 U.S. 606, 616–617 (1972). Thus, “for the purpose of construing the privilege *** [the President] and his aide[s] are to be ‘treated as one’” (*id.* at 616), so that 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” (*id.* at 618).

Because petitioners Kissinger, Mitchell, and Haldeman were “operating under [President Nixon's] specific authority and were carrying out [his] express orders” (I J.A. 48–49), they are accordingly entitled to a derivative absolute immunity in this case.

C.

Petitioners Kissinger, Mitchell, and Haldeman are entitled to absolute immunity from liability based on advice they gave the President on matters within their respective areas of official responsibility. Under the Constitution (Art. II, § 2), the President is authorized to require the opinion of his closest aides and advisors on matters of public policy. The spectre of personal damages liability would unduly interfere with the President's authority to obtain the views and recommendations of high-ranking executive officers. Moreover, this exchange between the President and his subordinates is protected by a constitutional privilege that is "inextricably rooted in the separation of powers." *United States v. Nixon*, *supra*, 418 U.S. at 708. A qualified immunity would be inadequate to secure these constitutional principles and would deter the expression of "candid, objective, and even blunt or harsh opinions in Presidential decisionmaking" (*id.* at 708). In light of the "special nature of their responsibilities" as presidential advisors (*Butz v. Economou*, *supra*, 438 U.S. at 511), petitioners Kissinger, Mitchell, and Haldeman should be absolutely immune from civil damages actions arising out of their advice to the President.

II.

Petitioners are also entitled to qualified immunity as a matter of law. 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*, *supra*, 438 U.S. at 506-507. 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). In *Procunier v. Navarette*, 434 U.S. 555 (1978), the Court applied these principles to hold that "since the constitutional right al-

legedly 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 this case, it is clear that the alleged constitutional violations did not involve "settled, indisputable law" or "basic, unquestioned constitutional rights." *Wood v. Strickland*, 420 U.S. 308, 321, 322 (1975). At the time the Halperin wiretap was in operation, the constitutional standards pertaining to national-security surveillance were, at the least, unsettled. The Court had first held the Fourth Amendment to be applicable to wiretaps at all only two years before the Halperin wiretap was installed in May of 1969, and its subsequent opinions recognized the separate and unresolved status of national-security wiretaps. Indeed, several lower federal courts prior to 1972 had upheld the government's longstanding view of the President's authority to conduct warrantless surveillance in national-security cases, and no contrary decisions were rendered until the final month of the Halperin wiretap. 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 here were not "clearly established" during the period of the wiretap.

Moreover, the court of appeals erred in suggesting that petitioners were not entitled to qualified immunity as a matter of law because the district court found that the Halperin wiretap had been continued in "bad faith" (Pet. App. 41a). The district court made no such finding. To the contrary, the court concluded that petitioners' conduct "cannot fairly be characterized as a wanton, reckless or malicious disregard of [respondents'] rights" (*id.* at 56a). It rejected petitioners' qualified-immunity defense solely 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).

More importantly, the precise limits of the doctrine of qualified immunity are not identical for all officials, but vary "dependent upon the scope of discretion and responsibilities of the office." *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974). 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 an absolute presidential immunity also indicate that, if the immunity is only qualified, these officials should not be required to disprove allegations of "malice" in personal damages actions. Such a qualified-immunity doctrine would impose a judicial check on intentional misconduct where the law is clearly established, but would avoid the burdens of a lengthy and disruptive hearing on allegations of malice that, as the court of appeals acknowledged, are easily made (Pet. App. 47a) but rarely sustainable (*id.* at 45a).

III.

The judicial decisions establishing constitutional standards for national-security surveillance, which were announced after the Halperin wiretap had been terminated, should not be applied retroactively to create personal damages liability for federal officers. See *Weinberg v. Mitchell*, 588 F.2d 275 (9th Cir. 1978).

First, as discussed above, the principles governing national-security surveillance were, at the least, unsettled at the time of the Halperin wiretap. Thus, these subsequent decisions "establish[ed] a new principle of law *** by deciding an issue of first impression whose resolution was not clearly foreshadowed ***." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971). Moreover, these decisions were designed to avoid "potential invasions of privacy and protected speech *** [and to provide] reassurance of the public generally that indiscriminate wiretapping and bugging of law-abiding citizens cannot occur." *United States v. United States District Court*, 407 U.S. 297, 317, 321 (1972). Since these decisions "look[] to a future free from such surveillance" (*Weinberg v. Mitchell, supra*, 588 F.2d at

278; emphasis added), retroactive application would not further their preventive purpose (see *Chevron Oil Co. v. Huson, supra*, 404 U.S. at 107).

Finally, 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 their acts to constitutional guidelines that did not then exist (see *Chevron Oil Co. v. Huson, supra*, 404 U.S. at 107). “[T]he 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). To create retroactively a constitutional tort action and hold petitioners personally liable for conduct that was not wrongful at the time, as the court below has done, “would be as inequitable as *ex post facto* criminal liability * * * [and] would be nothing short of punitive.” *Weinberg v. Mitchell, supra*, 588 F.2d at 278.

ARGUMENT

I. THE PRESIDENT AND HIS CLOSEST ADVISORS ARE ABSOLUTELY IMMUNE FROM PERSONAL DAMAGES LIABILITY FOR DECISIONS MADE IN THE EXERCISE OF THE PRESIDENT'S OFFICIAL AUTHORITY

The courts below in this case have held, for the first time in the history of the Republic, that the President of the United States is subject to personal damages liability for official acts taken in his capacity as the Nation's Chief Executive. This unprecedented ruling is contrary to both the historical understanding of the absolute immunity inherent in the Office of the President under Article II of the Constitution and the compelling reasons of public policy in favor of such a privilege for the President. In light of the general analysis of immunity issues established by this Court and the fundamental principle of separation of powers, these considerations require reversal of the lower courts' unwarranted assertion of judicial authority in per-

sonal damages actions to engage in routine oversight of the President's official conduct.¹⁷

A. THE PRESIDENT OF THE UNITED STATES IS ABSOLUTELY IMMUNE FROM CIVIL DAMAGES LIABILITY BASED ON THE CONDUCT OF HIS OFFICE

The President of the United States is entitled to absolute immunity from damages liability arising out of his official acts. As the head of the Executive Branch of the federal government, the President, like the constitutional officers of the Legislative and Judicial Branches,¹⁸ must be free both of the fear of personal liability and of undue interference by coordinate parts of the government. Absolute immunity is necessary to enable the President to discharge his Article II duties without regard to factors other than the best interests of the Nation and the dictates of his solemn oath of Office.¹⁹

¹⁷In our view, this absolute immunity is fully applicable to a former President who is sued in a personal damages action for his official conduct while in office. See *Nixon v. Administrator of General Services*, 433 U.S. 425, 448-449 (1977); *Bohmer v. Nixon*, Civil No. 75-4-T (S.D. Cal. June 16, 1976) (I J.A. 126); *Fonda v. Nixon*, Civil No. 73-2442-MML (C.D. Cal. May 23, 1974) (I J.A. 112); see also Pet. App. 53a (Gesell, J., concurring).

¹⁸See, e.g., *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, No. 79-198 (June 2, 1980); *Butz v. Economou*, 438 U.S. 478, 508-512 (1978); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975).

¹⁹As this Court has recognized, absolute immunity for government officials is supported by the principle of separation of powers, since it helps "to preserve the constitutional structure of separate, coequal, and independent branches of government * * *." *United States v. Gillock*, No. 78-1455 (Mar. 19, 1980), slip op. 9, quoting *United States v. Helstoski*, 442 U.S. 477, 491 (1979). "In the American governmental structure * * * [this absolute immunity] serves the * * * function of reinforcing the separation of powers so deliberately established by the Founders." *Davis v. Passman*, 442 U.S. 228, 235 n.11 (1979), quoting *United States v. Johnson*, 383 U.S. 169, 178 (1966). See also *Sinking-Fund Cases*, 99 U.S. 700, 718 (1878) ("One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict

The President must also be accorded an absolute immunity under the official immunity analysis established in this Court's precedents. In *Butz v. Economou*, 438 U.S. 478 (1978), the Court, recognizing "that the law of privilege as a defense to damages actions against officers of Government has 'in large part been of judicial making'" (*id.* at 501-502, quoting *Doe v. McMillan*, 412 U.S. 306, 318 (1973), and *Barr v. Matteo*, 360 U.S. 564, 569 (1959)), set forth the following standard to govern the resolution of immunity issues (438 U.S. at 503, 506, 507, 508; footnote omitted):

Having determined that the plaintiff is entitled to a remedy in damages for a constitutional violation, the court then must address how best to reconcile the plaintiff's right to compensation with the need to protect the decisionmaking processes of an executive department. * * *

* * * * *

[F]ederal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope * * * [and] that absolute immunity is essential for the conduct of the public business.

* * * * *

Although a qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations * * * there are some officials whose special functions require a full exemption from liability. * * * In each case, we have undertaken "a considered inquiry into the immunity

observance of this salutary rule"). And the possibility that presidential actions may be "subject to judicial review in various circumstances" does not suggest that such actions "may * * * be made the basis for a civil * * * judgment against * * * [the President]." *Doe v. McMillan*, 412 U.S. 306, 311-312 (1973), quoting *Gravel v. United States*, 408 U.S. 606, 624 (1972).

We note that, in the present case, the President was exercising his powers conferred by Article II of the Constitution in the critical areas of national defense and foreign affairs. See pages 37-38, *infra*; cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

historically accorded the relevant official at common law and the interests behind it." [*Imbler v. Pachtman*, 424 U.S.] at 421.

The "special functions" of the presidency clearly call for a full exemption from liability for the President of the United States.

1. It has long been recognized that the President, in whom "[t]he executive Power [is] vested" (Art. II, § 1), is not personally accountable in judicial proceedings for the exercise of his executive powers. At the time of the First Congress, Vice President John Adams and Senator Oliver Ellsworth of Connecticut (who had been a member of the Constitutional Convention and later became Chief Justice of the United States) explained that no action could be instituted personally against the President because any such judicial authority would permit a single judge or court to "stop the whole machine of government." W. Maclay, *Sketches of Debate in the First Senate of the United States* 151-152 (Harris ed. 1880). Nor did they believe that this presidential immunity placed the "President *** above the laws," since he was liable to impeachment; however, "you could only impeach him, and no other process whatever lay against him" (*id.* at 152). Similarly, as Mr. Justice Story later concluded:

There are *** incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them, without any obstruction or impediment whatsoever. The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose *his person must be deemed, in civil cases at least, to possess an official inviolability*. *In the exercise of his political powers he is to use his own discretion, and is accountable only to his country, and to his own conscience*. His decision, in relation to these powers, is subject to no control; and his discretion, when exercised, is conclusive.

III J. Story, *Commentaries on the Constitution of the United States* § 1563, at 418-419 (1833 ed.) (emphasis added).

The drafters of the Constitution were well aware of the potential for the new government to abuse the powers conferred upon it. They were also cognizant that the President, unlike the King of England, was not to be “above Justice” (II M. Farrand, *The Records of the Federal Convention of 1787*, at 65 (rev. ed. 1966) (remarks of George Mason)), that “the maxim would never be adopted here that the chief Magistrate could do no wrong” (*id.* at 66) (remarks of Elbridge Gerry), and that “some provision should be made for defending the Community ag[ain]st the incapacity, negligence or perfidy of the chief Magistrate” (*id.* at 65) (remarks of James Madison).²⁰ But, while the Framers acknowledged that “[t]his Magistrate is not the King * * * [t]he people are the King,” they also recognized that “[w]hen we make him amenable to Justice however we should take care to provide some mode that will not make him dependent on the [other branches of government]” (*id.* at 69) (remarks of Gouverneur Morris).²¹

In the Framers’ view, the power of impeachment and the political check of the election process would serve to restrain misfeasance in the exercise of presidential authority. For example, as Elbridge Gerry observed, “[a] good magistrate will not fear [impeachments]. A bad one ought to be kept in fear of them” (*id.* at 66). And Rufus King noted that the President “would periodically be tried for his behaviour by his electors, who would continue or discontinue him in trust according to the manner in which he had discharged it. * * * [T]he periodical responsibility to the electors” would assure his proper conduct of office (*id.* at 67–68). Alexander Hamilton summarized these principles by stating that “the two greatest securities [the people] can have for the faithful exercise of any delegated power [are], *first*, the restraints of public opinion * * *; and, *secondly*, the opportunity of discovering with facility

²⁰ See also *The Federalist* No. 69 (A. Hamilton) at 41, 47 (1914 ed.); *The Federalist* No. 70 (A. Hamilton) at 55–56 (1914 ed.).

²¹ See also *The Federalist* No. 71 (A. Hamilton) at 61 (1914 ed.) (“It is one thing to be subordinate to the laws, and another to be dependent on the [other branches of government]”).

and clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it. * * * '[T]he executive power is * * * confined * * * [by] the jealousy and watchfulness of the people * * *.' *The Federalist No. 70* (A. Hamilton) at 55, 56-57 (1914 ed.). See also the comments of James Wilson, a delegate to the Constitutional Convention and later a Justice of this Court:

To [the President] the provident or improvident use of [power] is to be ascribed. For the first, he will have and deserve undivided applause. For the last, he will be subjected to censure; if necessary, to punishment. He is the dignified, but accountable magistrate of a free and great people. * * * [B]y continuing to be the man of the people, his investiture will be voluntarily, and cheerfully, and honorably renewed.

* * * * *

The doctrine of impeachments is of high import in the constitutions of free states. On one hand, the most powerful magistrates should be amenable to the law: on the other hand, elevated characters should not be sacrificed merely on account of their elevation. * * *

I *The Works of James Wilson* 400 (Andrews ed. 1896);
 II *The Works of James Wilson, supra*, at 45.²²

In addition to these constraints of impeachment, re-election, and public opinion, the Founding Fathers also erected a system of checks and balances to avert the ille-

²² As Wilson stated in the Pennsylvania Convention on the adoption of the Constitution:

The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality * * *. Add to all this, that office is placed high, and is possessed of power far from being contemptible, yet not a single privilege is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment.

II J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 480 (1836) (emphasis omitted).

gitimate exercise of presidential powers. In many of the most significant regards—the veto power (Art. I, § 7), the defense and war powers (Art. I, § 8; Art. II, § 2), the treaty power (Art. II, § 2), and the appointment power (*ibid.*)—the President and the Congress enjoy shared responsibilities. Through this device, the Constitution serves directly to forestall the wrongful use of the authority of the President. “It is far more wise to interpose checks upon the actual exercise of the power, than remedies to redress, or punish an abuse of it.” III J. Story, *supra*, § 1509, at 362.

This constitutional plan—to prevent presidential abuses by means of checks and balances and to deter and punish such abuses through impeachment, the electoral process, and public opprobrium—was fully explained by Hamilton in his concluding discussion of the Executive in *The Federalist*:

Does it [the structure and power of the executive department] also combine the requisites to safety, in a republican sense,—a due dependence on the people, a due responsibility? The answer to this question has been anticipated in the investigation of its other characteristics, and is satisfactorily deducible from these circumstances; from the election of the President once in four years by persons immediately chosen by the people for that purpose; and from his being at all times liable to impeachment, trial, dismission from office, incapacity to serve in any other, and to forfeiture of life and estate by subsequent prosecution in the common course of law. But these precautions, great as they are, are not the only ones which the plan of the convention has provided in favor of the public security. In the only instances in which the abuse of the executive authority was materially to be feared, the Chief Magistrate of the United States would, by that plan, be subjected to the control of a branch of the legislative body. What more could be desired by an enlightened and reasonable people?

The Federalist No. 77 (A. Hamilton) at 97 (1914 ed.). Nothing in the entire course of these deliberations suggests in any way that the President was also to be

liable to suit for money damages arising out of the conduct of his Office. In light of the extensive consideration given to the issue of potential presidential misconduct and the settled doctrine in England that the King was not subject to judicial proceedings, it is inconceivable that the Framers intended by their silence to assent to personal damages actions against the President based on the exercise of his official duties. Rather, the manifest inference, in line with the conclusions of Vice President Adams and Senator Ellsworth in the First Senate, and of Mr. Justice Story, is that the Constitution does not sanction such suits.²³

²³ As historical support for its conclusion that “[t]he constitutional scheme betrays no indication that any kind of immunity was intended for the President” (Pet. App. 42a) and that the President is therefore amenable to personal damages actions for his official conduct, the court of appeals (*id.* at 42a–43a n.129) relied almost exclusively on various statements made by Charles Pinckney. However, in citing Pinckney for the assertion that “[n]o privilege of this kind was intended for your Executive * * *[,]” the court of appeals misconstrued Pinckney’s remarks.

In February 1800, a newspaper in Philadelphia published an article about a bill pending in the Senate. Some Senators objected to the story, and a motion was introduced to have the Committee of Privileges inquire into its source. 10 Annals of Cong. 63, 68 (1800). Pinckney opposed the motion, stating that there is not “a word or a sentence in the whole [of the Constitution] that can by any possible construction be made to mean that for any libels or printed attack on the public conduct or opinions of either House of Congress, or of any of its members, that their privilege shall extend to ordering the persons charged with the offence before them, and imprisoning them at their will” (*id.* at 71; see also *id.* at 72). In aid of his position, Pinckney argued that the sedition statute, which made it a criminal offense to libel the President or either House of Congress, would have been unnecessary if Congress possessed the asserted power. In this connection, Pinckney noted, in the passage selectively quoted by the court of appeals (*id.* at 74; emphasis added):

[L]et us inquire, why the Constitution should have been so attentive to each branch of Congress, so jealous of their privileges, and have shewn so little to the President of the United States in this respect. Why should the individual members of either branch, or either branch itself, have more privileges than him? He is himself, as far as his qualified negative goes, a branch of the Legislature; he is, besides, your Executive, he is the sword

2. In view of these authorities, the absence of personal damages actions against the President for his official conduct is not surprising. This dearth of litigation bespeaks the common and settled understanding that the President is not subject to monetary liability. Moreover, on the infrequent occasions when such litigation has been commenced, the federal courts have consistently ruled that the President cannot be held personally accountable for damages. See *Reese v. Nixon*, 347 F. Supp. 314, 316-317 (C.D. Cal. 1972), aff'd in pertinent part, No. 72-3070 (9th Cir. May 3, 1974) (I J.A. 95-97); *Bohmer v. Nixon*, Civil No. 75-4-T (S.D. Cal. June 16, 1976) (I J.A. 122-126); *Davis v. Nixon*, Civil No. 73-1520-LTL(G) (C.D. Cal. June 18, 1974) (I J.A. 114-121); *Fonda v. Nixon*, Civil No. 73-2442-MML (C.D. Cal. May 23, 1974) (I J.A. 98-113). See also *Barr v. Matteo*, 360 U.S. 564, 583 (1959) (Warren, C.J., dissenting) (absolute immunity of officials who were appointed by and report to the President "partakes of presidential immunity"); *Mellon v. Brewer*, 18

of the law, and does he possess any privileges like these? If a man meets him walking alone in the streets and insults him, or if one of ruffian manners should enter his house, and even abuse him there, has your President any privileges like these? Can he commit and imprison without a trial? No sir, he must resort to the laws for satisfaction, where the person charged with outrage will be heard, and where each party will have justice done them, by men who ought to be so impartially summoned as that no undue bias will be found, when they come to decide. No privilege of this kind was intended for your Executive, nor any except that which I have mentioned for your Legislature. The Convention which formed the Constitution well knew that this was an important point, and no subject had been more abused than privilege. They therefore determined to set the example, in merely limiting privileges to what was necessary, and no more.

Thus, the privilege addressed by Pinckney was not a presidential immunity from damages actions (or, for that matter, any other privilege or immunity incident to the presidency), but instead concerned the prerogative of the President summarily to charge, convict, and punish for an offense without resort to judicial proceedings. Hence, the court of appeals incorrectly read Pinckney's comments to militate against an absolute immunity for the President.

F.2d 168, 172 (D.C. Cir.), cert. denied, 275 U.S. 530 (1927) (publication of allegedly defamatory "official communication or report by the President would not have formed the basis of an action for libel").

3.a. In addition to its historical and precedential support, this doctrine—that the President is absolutely immune from personal damages liability for his official acts—also rests on compelling grounds of public policy, reinforced by the separation of powers (see note 19, *supra*). Damages actions against the President challenging the legality of his official acts would constitute a substantial intrusion into the President's constitutional responsibilities. The risk of personal liability would serve to inhibit the fearless and decisive exercise of presidential authority, and "the public trust [placed in the President] would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Imbler v. Pachtman*, 424 U.S. 409, 424–425 (1976).

The federal executive power is vested in whole in the President, and he is charged with the faithful execution of his Office and the preservation and defense of the Constitution. See Art. II, § 1; see also, e.g., *Myers v. United States*, 272 U.S. 52, 117, 151, 163–164 (1926). As the Nation's Chief Executive, the President is repeatedly called upon to make discretionary decisions on issues that affect the lives of virtually every American citizen. Because the easier or less controversial matters are disposed of at a lower level, it is the rare presidential decision that does not involve difficult choices among reasonable alternatives or adversely affect some segment of the Nation.

Undeniably, the President's discharge of these "grave, complex and unique responsibilities" (Pet. App. 53a (Gesell, J., concurring)) should be motivated solely by considerations of the public welfare, not by fear of personal liability in damages. Yet any concern for the financial security of his family and himself would divert the President's attention from the competing public policies on which his decisions should be made; especially in light of the vast

potential liability confronting him for virtually every presidential decision, it is unavoidable that (in the absence of an absolute immunity from damages) such personal considerations would intrude themselves at least in some instances. As Judge Learned Hand explained in *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950), "to submit *** [the President] to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." Thus, "[t]he societal interest in providing *** [the President] with the maximum ability to deal fearlessly and impartially with *** [the duties of his Office is] an acceptable justification for official immunity." *Ferri v. Ackerman*, 444 U.S. 193, 203 (1979) (footnote omitted).²⁴

Furthermore, the President is a natural target for those dissatisfied by the outcome of his decisions. The matters that come to the attention of the President are necessarily the kind that, in difficulty and importance, are likely to "arouse the most intense feelings." *Butz v. Economou*,

²⁴ The immunity of the President is because of his official position. He is a great and necessary part of our government. The legislative branch is composed of many members, while the judicial branch is a collective body and it would be difficult to injure either numerically so as to interfere with the administration of the Government. But it is wholly different with the executive branch. One man constitutes all there is of that, and upon him the Constitution has placed many great and important duties, and these duties are constant. He does not sit in authority at stated intervals like Congress and the courts. There is no recess in the discharge of his official duties. From the time he takes the oath until his office expires there is a continuity of official obligations and duties, sacredly and solemnly imposed upon him by the Constitution. Anything which impairs his usefulness in the discharge of his duties, however slight, to that extent impairs the operation of the Government.

* * * * *

The President is the highest official of the Government and by the express terms of the Constitution is the executive branch of the Government. The language of the Constitution is, "The

438 U.S. 478, 509 n.36 (1978), quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967); see also *Stump v. Sparkman*, 435 U.S. 349, 364 (1978); *Imbler v. Pachtman*, *supra*, 424 U.S. at 425; *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 348 (1871). It is all too easy for disgruntled individuals or groups, simply by alleging an “unconstitutional animus” (*Butz v. Economou*, *supra*, 438 U.S. at 512), to carry their disagreement from the political arena to the court-room in an effort to influence or harass the President, to gain public attention for their cause or position, to improve their situation by means of a negotiated settlement, or to further their self-interest in some other way. As Judge Gesell noted, “many of these cases are political in character [and] involve highly controversial acts” (Pet. App. 52a). The prospect of a burgeoning number of lawsuits against the President in his individual capacity militates strongly in favor of absolute immunity.²⁵

Of course, there is also an undeniable public interest in avoiding abuses of presidential authority.²⁶ But, as the

executive power shall be vested in a President of the United States of America.” That means all the executive power of the government, without limitation or reserve, is vested in the President, and it is only because the President is clothed with so extraordinary a power that he can be said to be exempt from the operations of the law.

II D. Watson, *The Constitution of the United States* 1023–1024, 1025–1026 (1910).

²⁵ See Pet. App. 51a (Gesell, J., concurring) (“with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials in their personal capacities based on alleged constitutional torts”). See also, e.g., *Nixon v. Fitzgerald*, petition for cert. pending, No. 79-1738 (filed May 2, 1980); *Clark v. United States*, 481 F. Supp. 1086 (S.D.N.Y. 1979), stay granted, Nos. 80-6016, 80-6024 (2d Cir. June 24, 1980).

²⁶ As Judge Hand explained in *Gregoire v. Biddle*, *supra*, 177 F.2d at 581:

It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good,

court of appeals recognized (Pet. App. 45a), the occasions of such abuse are likely to be rare. Moreover, there exist means wholly apart from damages actions to deter the improper exercise of presidential authority. The momentous nature of his undertaking, the visibility of his position, and the solemn oath to which he swears (as prescribed in the Constitution itself (Art. II, §1)), all work to impress upon the President the grave responsibilities of his Office and the public trust he bears. Beyond that, "there are obvious political checks against an incumbent[] [President's] abuse of * * * [his position]." *Nixon v. Administrator of General Services*, 433 U.S. 425, 448 (1977). For instance, the system of checks and balances, including the process of congressional oversight, acts to constrain and to detect the illegitimate uses of the President's powers.²⁷ As the ultimate measure, Congress can impeach and remove a Presi-

should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried * * *. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

See also *Butz v. Economou*, *supra*, 438 U.S. at 529 (Rehnquist, J., dissenting) ("[T]here are inevitable trade-offs in connection with any doctrine of official liability and immunity. * * * [While] an occasional failure to redress a claim of official wrongdoing would result from the doctrine of absolute immunity * * *, it * * * [is] a lesser evil than the impairment of the ability of responsible public officials to govern.").

²⁷ See *United States v. Brewster*, 408 U.S. 501, 517-518, 523 (1972):

[U]nlike England with no formal, written constitutional limitations on the monarch, [the authors of our Constitution] defined limits on the co-ordinate branches, providing other checks to protect against abuses of the kind experienced in that country.



The check-and-balance mechanism * * * [has discouraged] abuses of power * * * [and has not] tolerated them long when they arose.

Congress has recently demonstrated its capacity to oversee the actions of the Executive Branch, including executive actions in the areas of

dent who is unfaithful to the duties of his Office.²⁸ And a President who has been convicted upon impeachment can be criminally prosecuted for any such offenses (Art. I, § 3).²⁹ In addition, the critical scrutiny received by a Presi-

national security and foreign affairs. See, e.g., Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783; War Powers Resolution, 50 U.S.C. 1541 *et seq.*; *Final Report of the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities*, S. Rep. No. 94-755, 94th Cong., 2d Sess. (1976) (Church Committee).

²⁸The impeachment power provides a substantial safeguard. Article II, paragraph (2) of the articles of impeachment recommended by the House Judiciary Committee against petitioner Nixon was based precisely upon the acts alleged by respondents in this suit. See H.R. Rep. No. 93-1305, 93d Cong., 2d Sess. 146-150 (1974).

²⁹In holding that the President is entitled to only a qualified immunity, the court of appeals construed the Impeachment Clause to "reveal[] that incumbency does not relieve the President of the routine legal obligations that confine all citizens" (Pet. App. 43a, quoting *Nixon v. Sirica*, 487 F.2d 700, 711 (D.C. Cir. 1973) (en banc)). But the Clause does not support the court's conclusion. The cited provision that the official "convicted [upon impeachment] shall * * * be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law," is limited to criminal prosecutions and was designed to make clear that a prosecution following impeachment and conviction would not be barred by principles of double jeopardy. See, e.g., II J. Story, *Commentaries on the Constitution of the United States* §§ 780, 781 (1833 ed.); see also *United States v. Isaacs*, 493 F.2d 1124, 1142 (7th Cir.), cert. denied, 417 U.S. 976 (1974); *Nixon v. Sirica*, *supra*, 487 F.2d at 757 (MacKinnon, J., concurring in part and dissenting in part). At all events, the applicability of the Impeachment Clause to federal judges has not foreclosed recognition of an absolute judicial immunity from damages liability, and no different conclusion should obtain in the case of the President.

In rejecting an absolute presidential immunity, the court of appeals also stressed the lack of any express immunity for the Executive Branch in the Constitution (Pet. App. 42a-43a). This line of reasoning was rejected by the Court in *United States v. Nixon*, 418 U.S. 683, 705-706 n.16 (1974), quoting *Marshall v. Gordon*, 243 U.S. 521, 537 (1917) ("the silence of the Constitution on this score is not dispositive. * * * [T]hat which [is] reasonably appropriate and relevant to the exercise of a granted power [is] to be considered as accompanying the grant'"). We also note that the only express constitutional immunity for governmental officers—the Speech or Debate Clause (Art. I,