

August 9, 2005

MEMORANDUM FOR CHAIRMAN AND COMMISSIONERS
2005 BASE CLOSURE AND REALIGNMENT COMMISSION

From: GENERAL COUNSEL

Subj: SCOPE OF IMMUNITY

The question has arisen several times of whether commissioners are immune from civil and criminal liability in connection with activities associated with performance of duties as members of the 2005 Defense Base Closure and Realignment (BRAC) Commission. This memorandum provides an overview of the scope of the immunities that may apply to the Commissioners serving on the 2005 BRAC Commission. Please note that this memorandum provides general guidance only, and the basic legal principles stated herein may change when applied to the specific factual circumstances that may affect an individual Commissioner. Further legal guidance from the BRAC Commission Office of General Counsel should be requested if specific questions arise.

SUMMATION

As far as the Commissioners are concerned, they will be immune for their official acts as long as such actions do not exceed the scope of their authority, or knowingly or maliciously cause a violation of another person's constitutional rights, or create an action in tort that relieves the U.S. Government of liability under the FTCA (and thus make individual Commissioners personally liable for such acts). Insofar as the Commissioners may be sued in their official capacities, legal representation will be undertaken by the Department of Justice (with assistance and support from the Office of General Counsel, as necessary). A discussion of this conclusion follows.

ABSOLUTE IMMUNITY

Judges and prosecutors have absolute immunity from civil liability, and claims for damages deriving from civil suits. Judges were accorded this absolute immunity to protect them against lawsuits claiming that judges had been tainted by improper motives. (See Bradley v. Fisher, 13 Wall 335, 347 (1872)). This grant of immunity permits judges to exercise their judicial functions, and preserves their independent judgment. This immunity has been extended to executive branch officials who perform roles that are "functionally comparable" to a judge (e.g., federal hearing examiners and administrative law judges). See Butz v. Economou, 438 U.S. 478, 513-515 (1978)). Further, this protection has also been extended to prosecutors (see Yaselli v. Goff, 275 U.S. 503 (1927), *aff'g* 12 F.2d 393 (CA2 1926), and to agency attorneys who conduct trials and present evidence on the record to the trier of fact. *Butz, supra*, 438 U.S. at 516-517.¹

¹ Absolute immunity may also be granted to legislators performing their legislative functions (but not while performing other acts even if such acts are performed in their official capacity). See Gravel v. United States, 408 U.S. 606, 625 (1972), which also made the Speech and Debate Clause derivatively applicable to the "legislative acts" of a Senator's aide that would have been privileged if performed by the Senator himself. *Id.* at 621-622. See

QUALIFIED IMMUNITY

Courts have recognized that the common law doctrine of official immunity granting legal protection from lawsuits to federal and state officials is necessary in order to permit such individuals to fulfill their official functions without fear of malicious prosecution. However, this grant of immunity is not absolute, but qualified, based on the following considerations.

Federal officials will not be held liable for making mistakes in judgment, whether the mistake is one of fact or law. (*See Butz v. Economou*, 438 U.S. 478, 507 (1978)). Nevertheless, federal officers in the executive branch performing discretionary functions will be granted official immunity and shielded from liability for civil damages as long as their conduct does not: (1) violate established statutory rights (*see Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 688 (1982)); (2) violate the U.S. Constitution; or (3) comprise a tortious act that fall outside the scope of the protection afforded federal officials under the Federal Tort Claims Act, as discussed below.

CONSTITUTIONAL TORTS

Federal officials may not violate the U.S. Constitution or discharge their duties in a manner that they “should know transgresses a clearly established constitutional rule.” (*See Butz v. Economou*, 438 U.S. 478, 507 (1978)). In other words, federal officials may not be granted official immunity, and may be subject to lawsuits for money damages, where they knowingly caused (or maliciously intended to cause) a violation of an affected person’s constitutional right. Generally speaking, a violation of a constitutional right would involve the deprivation of life, liberty or property without due process of law, or may involve the violation of another constitutionally protected right such as the right to freedom of speech. Courts have opined that giving federal officials absolute immunity in these cases would seriously undermine constitutional guarantees.

Thus, insofar as BRAC Commissioners are concerned, they shall be granted official immunity as long as their official conduct does not knowingly or maliciously deprive an affected person of his or her constitutional rights. (*See Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971)).

TORTIOUS ACTS

Additionally, the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346, 2671-2680, permits suits against the United States for torts committed by an employee of the U.S. Government. Section 2671 of the FTCA defines an “employee of the government” as an officer or employee of any federal agency as well as members of the armed forces and National Guard. A “federal agency” includes the three branches of government, all executive and military departments and other

also Eastland v. United States Serviceman’s Fund, 421 U.S. 491 (1975), extending absolute immunity to U.S. Senators and Representatives under the Speech and Debate Clause. In some circumstances, absolute immunity may be granted to the President and to Presidential aides, but this analysis is very complex, and falls outside the scope of this memorandum. (*See generally* Art. II, U.S. Const.)

entities, but does not include “any contractor with the United States.” The Commissioners fall within the scope of this definition.

The FTCA generally applies to claims: (1) for money damages, (2) arising from damage to property, personal injury, or death, (3) caused by a negligent or wrongful act (4) of a federal government employee (5) acting within the scope of his or her employment, (6) in circumstances where a private person would be liable under state law. Each of these six conditions must be satisfied before the federal court will find the government liable under the FTCA. In addition, the plaintiff must file an administrative claim with the appropriate government agency in compliance with 28 U.S.C. § 2675 before commencing an action in federal court.

Even when all of these requirements are satisfied, a claim may be barred if it falls under 28 U.S.C. § 2680(h) which provides that the U.S. Government will *not* be liable when any of its employees or agents commit the torts of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. (However, the Government is liable if a law enforcement officer commits assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.)

Please let me know if you have other or related questions.

DAVID C. HAGUE
General Counsel

July 26, 2005

INFORMATION MEMORANDUM

TO: BRAC Commissioners

SUBJECT: Official Immunities of BRAC Commissioners

FROM: Office of the General Counsel

This information memorandum provides a quick overview of the scope of the immunities that may apply to the Commissioners serving on the 2005 Defense Base Closure and Realignment (BRAC) Commission. Please note that this memorandum provides general guidance only, and the basic legal principles stated herein may change when applied to the specific factual circumstances that may affect an individual Commissioner. Further legal guidance from the Office of the General Counsel should be requested if specific questions arise.

ABSOLUTE IMMUNITY. In a nutshell, only judges and prosecutors have absolute immunity from civil liability (and claims for damages deriving from civil suits). Judges were accorded this absolute immunity to protect them against lawsuits claiming that judges had been tainted by improper motives. (*See Bradley v. Fisher*, 13 Wall 335, 347 (1872)). This grant of immunity permits judges to exercise their judicial functions, and preserves their independent judgment. This protection has also been extended to prosecutors. (*See Yaselli v. Goff*, 275 U.S. 503 (1927), *aff'g* 12 F.2d 393 (CA2 1926)).

QUALIFIED IMMUNITY. Courts have recognized that the common law doctrine of official immunity granting legal protection from lawsuits to federal and state officials is necessary in order to permit such individuals to fulfill their official functions without fear of malicious prosecution. However, this grant of immunity is not absolute, but qualified, based on the following considerations.

Federal officials will not be held liable for making mistakes in judgment, whether the mistake is one of fact or law. Nevertheless, federal officers in the executive branch may not violate the U.S. Constitution or discharge their duties in a manner that they "should know transgresses a clearly established constitutional rule." (*See Butz v. Economou*, 438 U.S. 478, 507 (1978)). Thus, federal officials will not be granted official immunity, and may be subject to lawsuits for money damages, where they knowingly caused (or maliciously intended to cause) a violation of an affected person's constitutional right. Generally speaking, a violation of a constitutional right would involve the deprivation of life, liberty or property without due process of law, or may involve the violation of another constitutionally protected right such as the right to freedom of speech. Courts have opined that giving federal officials absolute immunity in these cases would seriously undermine constitutional guarantees.

Thus, insofar as the BRAC Commissioners are concerned, they shall be granted official immunity as long as their official conduct does not knowingly or maliciously deprive an affected person of his or her constitutional rights. (*See Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971)).

TORTIOUS ACTS. Additionally, the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346, 2671-2680, permits suits against the United States for torts committed by an employee of the U.S. Government. 28 U.S.C. § 2671 defines an “employee of the government” as an officer or employee of any federal agency as well as members of the armed forces and National Guard. A “federal agency” includes the three branches of government, all executive and military departments and other entities, but does not include “any contractor with the United States.” The Commissioners fall within the scope of this definition.

The FTCA generally applies to claims: (1) for money damages, (2) arising from damage to property, personal injury, or death, (3) caused by a negligent or wrongful act (4) of a federal government employee (5) acting within the scope of his or her employment, (6) in circumstances where a private person would be liable under state law. Each of these six conditions must be satisfied before the federal court will find the government liable under the FTCA. In addition, the plaintiff must file an administrative claim with the appropriate government agency in compliance with 28 U.S.C. § 2675 before commencing an action in federal court.

Even when all of these requirements are satisfied, a claim may be barred if it falls under 28 U.S.C. § 2680(h) which provides that the U.S. Government will *not* be liable when any of its agents commits the torts of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. (However, the Government is liable if a law enforcement officer commits assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.)

SUMMATION. As far as the Commissioners are concerned, they will be immune for their official acts as long as such actions do not knowingly or maliciously cause a violation of another person’s constitutional rights, or create an action in tort that relieves the U.S. Government of liability under the FTCA. Insofar as the Commissioners may be sued in their official capacities, legal representation will be undertaken by the Department of Justice (with assistance and support from the Office of the General Counsel, as necessary).



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§ 1983. Civil action for deprivation of rights

Release date: 2005-02-25

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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*458 U.S. 670, *; 102 S. Ct. 3304, **;
73 L. Ed. 2d 1057, ***; 1982 U.S. LEXIS 7*

FLORIDA DEPARTMENT OF STATE v. TREASURE SALVORS, INC., ET AL.

No. 80-1348

SUPREME COURT OF THE UNITED STATES

458 U.S. 670; 102 S. Ct. 3304; 73 L. Ed. 2d 1057; 1982 U.S. LEXIS 7; 50 U.S.L.W. 5056

January 20, 1982, Argued
July 1, 1982, Decided

PRIOR HISTORY:

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

DISPOSITION: [621 F.2d 1340](#), affirmed in part and reversed in part.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner state appealed a decision from the United States Court of Appeals for the Fifth Circuit, affirming the district court's conclusion that the U.S. Const. amend. XI did not prevent the federal court from resolving the controverted claims to ownership of the artifacts of the Nuestra Senora de Atocha, a sunken 17th century Spanish galleon.

OVERVIEW: Under duress, respondent salvage company signed a contract with petitioner to permit respondent to conduct underwater salvage operations on the Atocha, a 17th century Spanish galleon, carrying a cargo of treasure. The contract entitled petitioner state to 25 percent of the value of the cargo. The federal government eventually claimed its rights to the artifacts. Then respondent filed to recover the artifacts held by petitioner. Petitioner argued that the Eleventh Amendment, U.S. Const. amend. XI, barred exercise of the court of appeal's jurisdiction. The court held that there was no bar under the Eleventh Amendment. The federal court had jurisdiction to secure possession of the property from the named state official. On appeal, the United States Supreme Court affirmed in part. The eleventh Amendment did not bar the federal court's process to recover possession of the salvaged artifacts. Further, this was not a direct action against the State, but against a state official. The Court reversed as to ownership of the artifacts. The federal courts could not adjudicate the State's interest in the property without the State's consent.

OUTCOME: The court affirmed that the Eleventh Amendment did not bar the court from securing possession of the artifacts and property from the named state officials, since they had no colorable basis on which to retain possession of the artifacts. The court reversed on the issue of ownership of the property because the lower court could not adjudicate the State's interest in the property without the State's consent.

n2 The story of the *Atocha* and its discovery is recounted in Lyon, *The Trouble with Treasure*, 149 *National Geographic* 787 (1976).

----- End Footnotes-----

The State of Florida immediately claimed that the *Atocha* belonged to the State. The State claimed ownership pursuant to Fla. Stat. § 267.061(1)(b) (1974), which then provided: n3

"It is further declared to be the public policy of the state that all treasure trove, artifacts and such objects having intrinsic or historical and archeological value *which have been abandoned on state-owned lands or [*674] state-owned sovereignty submerged lands* shall belong to the state with the title thereto vested in the division of archives, history, and records management of the department of state for the purpose of administration and protection." (Emphasis added.) Officials of the Florida Division of Archives threatened to arrest Mel Fisher, president of Treasure Salvors, and to confiscate the boats and equipment of Treasure Salvors if it commenced salvage operations on the *Atocha* without a salvage contract from the State. Under this threat of arrest, Treasure Salvors executed a one-year contract with the State that permitted it to conduct underwater salvage operations on the vessel. n4 Similar contracts were executed during each of the three succeeding years.

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n3 The statute since has been amended in a manner not relevant to this case.

n4 The District Court found that the contract was entered into as a result of the "coercive acts of the Division of Archives in threatening arrest and confiscation." *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 459 F.Supp. 507, 522 (SD Fla. 1978). The State admits that if Treasure Salvors had salvaged without a contract arrests would have been made. Tr. of Oral Arg. 9.

----- End Footnotes-----

Each of the contracts was expressly predicated on the assumption that the *Atocha* was the property of the State of Florida because it had been found on submerged lands within the boundaries of the State. The contracts permitted Treasure Salvors "to conduct underwater salvage from and upon certain submerged sovereignty lands of and belonging to the State of Florida." App. 20. After describing in metes and bounds an area claimed to be "lying and being in Monroe County, Florida," the contract provided that the shipwreck site "is to be worked for the purpose of salvaging abandoned vessels or the remains thereof including, but not limited to, relics, treasure trove and other materials related thereto and located thereupon and therein, *which abandoned material is the property of the State of Florida.*" *Id.*, at 22 (emphasis added). The contract further provided:

[*675] "In payment for the Salvager's satisfactory performance and compliance with this Agreement, the Division will award to the Salvager seventy-five percent (75%) of the total appraised value of all material recovered hereunder, which payment shall be made at *****1063** the time division of such material is made by the parties hereto. Said payment may be made in either recovered material or fair market value, or in a combination of both, at the option of the Division's director." *Id.*, at 32-33.

The bargain, in brief, was between the Division of Archives, as the owner of the *Atocha* and its cargo, and Treasure Salvors, as a contractor that agreed to perform services for the Division. Treasure Salvors agreed to pay the Division \$ 1,200 each year, to post a performance bond, and to perform its work in a specified manner, all in exchange for the Division's agreement to transfer ownership of 75% of the proceeds of the operation -- or its equivalent -- to Treasure Salvors. The contracts did not purport to transfer ownership of any property to the Division of Archives; the State's claim to the property was predicated entirely on a provision of state law.

[3310]** In its attempt to salvage the lost treasure of the *Atocha*, Treasure Salvors was immensely successful. The salvager held some of the artifacts at its headquarters in Key West, while state officials held the remainder at the Division of Archives in Tallahassee. All of the property was deemed to belong to the State, however, subject to a subsequent distribution in which Treasure Salvors would receive its 75% contractual share.

In proceedings unrelated to the salvage operation, the United States and the State of Florida were engaged in litigation to determine the seaward boundary of submerged lands in the Atlantic Ocean and the Gulf of Mexico in which the State had rights to natural resources. In February 1974, a Special Master filed a Report that defined Florida's **[*676]** boundary landward of the site of the wreck of the *Atocha*. The State's objections to the Report were overruled. *United States v. Florida*, 420 U.S. 531 (1975). n5 A final decree was entered providing that, as against the State of Florida, the United States was entitled to the lands, minerals, and other natural resources in the area in which the remains of the *Atocha* had come to rest. *United States v. Florida*, 425 U.S. 791 (1976). n6

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n5 In its exceptions to the Special Master's Report, the State contended that the Master should have recognized that the boundaries of the State extended to the boundaries defined in the State's 1868 Constitution, rather than to the limits specified in the Submerged Lands Act of 1953. See 420 U.S., at 532. This Court considered that exception and held that the Master had properly rejected the State's argument. *Id.*, at 533.

n6 This area is on the Continental Shelf of the United States, in international waters. *Treasure Salvors, Inc. v. Abandoned Sailing Vessel*, 408 F.Supp. 907, 909 (SD Fla. 1976).

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After this Court overruled Florida's exceptions to the Special Master's Report, Treasure Salvors filed a complaint in the Federal District Court for the Southern District of Florida demanding that "Plaintiffs be put into possession of the ATOCHA and other property and that all other persons, firms, and corporations or government agencies be enjoined from interfering with Plaintiffs title, possession, and property," and that "Plaintiffs title be confirmed against all claimants and all the world." App. 9. The complaint invoked the court's admiralty and maritime jurisdiction pursuant to **[***1064]** Federal Rule of Civil Procedure 9(h) and, as an admiralty action *in rem*, named the *Atocha* as defendant. Items recovered from the *Atocha* in Treasure Salvors' possession were duly served with process and brought into the custody of the court. Most of the remainder of the wreck and its valuable cargo lay buried under sand in international waters; state officials held other artifacts in Tallahassee. No attempt was made at this time to serve the artifacts in Tallahassee.

The United States intervened in the action as a party-defendant and filed a counterclaim

seeking a declaratory judgment that the United States was the proper owner of the **[*677]** *Atocha*. n7 The District Court rejected the Government's claim of ownership and held that "possession and title are rightfully conferred upon the finder of the *res derelictae*." *Treasure Salvors, Inc. v. Abandoned Sailing Vessel*, 408 F.Supp. 907, 911 (1976). The court entered judgment in favor of Treasure Salvors "against the United States of America and all other claimants." Record 270. n8

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n7 The United States asserted a right of ownership under several federal statutes and the common-law doctrine of "sovereign prerogative." The State of Florida did not intervene at this time. It had notice of the litigation, however, and both assisted the United States in the lawsuit and entered into preliminary negotiations with the United States Department of the Interior regarding disposition of the *Atocha's* treasure in the event the Federal Government prevailed. See 621 F.2d 1340, 1343-1344 (CA5 1980).

n8 The court explained: "General principles of maritime and international law dictate that an abandonment constitutes a repudiation of ownership, and that a party taking possession under salvage operations may be considered a finder under the doctrine of 'animus revertendi,' i. e., the owner has no intention of returning. Ownership in the vessel would then vest in the finder by operation of law." 408 F.Supp., at 909 (citation omitted).

----- End Footnotes-----

[3311]** The Court of Appeals affirmed the judgment of the District Court as against the United States, but modified its decree. *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (CA5 1978). The United States had argued that the District Court lacked *in rem* jurisdiction to determine rights of the parties to that portion of the *Atocha* lying beyond the territorial jurisdiction of the court. The Court of Appeals agreed that the District Court lacked *in rem* jurisdiction over those portions of the *res* located outside the district; the court noted that for a court to exercise admiralty *in rem* jurisdiction the *res* itself must be brought within the district and seized by the court. *Id.*, at 333. The appellate court held, however, that by intervening in the action and stipulating to the court's admiralty jurisdiction the Government had "waived the usual requirement that the *res* be present within the territorial jurisdiction of the court and consented to the court's jurisdiction to determine **[*678]** its interest in the extraterritorial portion of the vessel." *Id.*, at 335. The court concluded that jurisdiction thus existed to determine claims of the United States to those portions of the *Atocha* lying beyond the territorial jurisdiction of the court, but not claims of other parties who had not appeared and submitted to the jurisdiction of the court. n9 On the merits, the Court of **[***1065]** Appeals rejected the statutory and common-law claims advanced by the United States.

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n9 The court stated:

"[T]he district court properly adjudicated title to all those objects within its territorial jurisdiction and to those objects without its territory as between plaintiffs and the United States. In affirming the district court, we do not approve that portion of its order which may be construed as a holding that plaintiffs have exclusive title to, and the right to immediate and sole possession of, the vessel and cargo as to other claimants, if any there be, who are

not parties or privies to this litigation." 569 F.2d, at 335-336 (footnote omitted).

----- End Footnotes-----

Throughout these proceedings, valuable artifacts of the *Atocha* remained in the custody of officials of the Florida Division of Archives in Tallahassee. Since Tallahassee is located in the Northern District of Florida, these artifacts also were located beyond the territorial jurisdiction of the District Court. Immediately following the decision of the Court of Appeals, Treasure Salvors filed a motion in the District Court for an order commanding the United States Marshal to arrest and take custody of these artifacts and bring them within the jurisdiction of the court. Record 318. That motion forms the basis of the present controversy.

The District Court issued a warrant to arrest. n10 Although [*679] the warrant was addressed to two officers of the Division of Archives, the State itself filed a motion to [**3312] quash the warrant, contending that the State of Florida was not a party in the case and had not waived the requirement that the court could exercise *in rem* jurisdiction only over that portion of the res within the territorial boundaries of the court. App. 43. n11 The State also sought and obtained an emergency stay from the Court of Appeals. Record 368. The District Court denied the motion to quash, ruling that the extraterritorial seizure was proper under Supplemental Admiralty Rule C(5). [*680] App. 51. n12 Since [***1066] the Court of Appeals had stayed execution of the warrant, the District Court issued an order to show cause why the State should not deliver the artifacts into the custody of the Marshal. n13

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n10 The warrant provided:

"WARRANT FOR ARREST IN REM

"THE PRESIDENT OF THE UNITED STATES OF AMERICA

"TO: THE MARSHAL OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA

"GREETING:

"WHEREAS, on the 18th day of July, 1975, Treasure Salvors, Inc., a corporation and Armada Research Corporation, a corporation, filed a Complaint under Rule 9(h) against the Unidentified Wrecked and Abandoned Sailing Vessel, her tackle, armament, apparel and cargo located with 2500 yards of a [*sic*] at coordinates 24 degrees 31.5' North Latitude and 82 degrees 20' West Longitude, said sailing vessel believed to be the NUESTRA SENORA DE ATOCHA for the reasons in said Complaint, and

"WHEREAS, in November of 1975 Notice of said claim was published in a newspaper of general circulation within the District, and

"WHEREAS, the State of Florida nor any of its agencies, agents, or employees, did appear in this cause to defend or prosecute any claim that they might have to any portions of said vessel that were in their possession, custody, care or control.

"NOW, THEREFORE, you are hereby commanded to take into your possession the portions of said vessel which have been in the possession or are in the possession of L. Ross Morrell and/or James McBeth, or under their custody, care or control and to bring said portions of said vessel within the jurisdiction of this Honorable Court and transfer possession of same to

the substitute custodian appointed in this action." App. 40-42.

n11 The State also asserted:

"A contract was entered into between Armada Research Corporation and the State of Florida on December 3, 1974 and was for a good and valid consideration. The contract alone determined the rights and obligations of the contracting parties and was in no way affected by [the decision of this Court in] *United States v. Florida*. This contract was fully executed and performed prior to the *United States v. Florida [sic]*." *Id.*, at 44.

In response to the State's assertion that the contracts determined the rights of the contracting parties, Treasure Salvors filed a supplemental complaint in federal court. Record 369. The complaint sought a declaratory judgment that the contracts between Treasure Salvors and the State were void.

n12 The court also held that, in light of the State's claim that it had a contractual right to 25% of the res, "the State of Florida has waived the general requirement that the *res* be within the territorial jurisdiction of the court and, further, has consented to the court's jurisdiction over its interest in any portions of the vessel." App. 59.

n13 The Court of Appeals then dissolved the emergency stay. *Id.*, at 65. The court ordered: "The United States Marshal may execute the warrant of arrest and upon doing so shall forthwith deliver custody of all of the items in question to a custodian who will take possession of them *in situ* and shall place them under lock or seal at their present location and hold them secure." *Id.*, at 68. The appellate court denied a motion for reconsideration that had contended that the District Court lacked jurisdiction. "The question of the jurisdiction of the District Court for the Southern District of Florida is for that court to determine in the first instance on the basis of such record as may be developed in that court." *Id.*, at 69. To expedite the litigation, Treasure Salvors agreed to permit the State to serve as substitute custodian. The warrant was executed and, with the State serving as custodian, the artifacts came into the control of the United States Marshal.

----- End Footnotes-----

In response to the order to show cause, the State raised several substantive issues in the District Court. Record 425. Contending that a supplemental complaint filed by Treasure Salvors, see n. 11, *supra*, demonstrated that the State of Florida was a defendant in the action, the State argued that the Eleventh Amendment barred an exercise of the court's jurisdiction. The State also repeated its arguments that the court lacked *in rem* jurisdiction in admiralty because the res was not present within the district and that the decision of this Court in *United States v. Florida* did not affect the State's "contractual" right to a share of the artifacts. Record 429-439.

The District Court rejected these arguments in a comprehensive memorandum. *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 459 F.Supp. 507 (1978). The court first held that, just as all claims of the [*681] United States had been resolved in the earlier proceeding, all claims of the State were barred because the State of Florida had acted in privity with the United States in that proceeding. *Id.*, at 512; see n. 7, *supra*. Alternatively, the court held that the extraterritorial arrest of the salvaged articles was proper under Supplemental Admiralty Rule C(5) and that the court thus had obtained jurisdiction *in rem* to resolve ownership of the res. 459 F.Supp., at 518. On the merits, the

court rejected on multiple grounds the State's contractual claim to the property. *Id.*, at 521.

At the conclusion of its memorandum opinion, the court rejected the State's Eleventh Amendment defense. *Id.*, at 526. The court first held that the State necessarily had waived the Amendment as to any claim to the property that it asserted in federal court. *Ibid.* The court then held that, apart from any claim advanced by the State, the Eleventh Amendment did not bar **[**3313]** the seizure of the artifacts and subsequent transfer to the custody of the Marshal. n14

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n14 The court asserted several grounds in support of this decision. Essentially, the court held: "There is no Eleventh Amendment bar to the mere arrest of articles of salvage unless the state is the owner. If the state is not the owner, the court may proceed." 459 F.Supp., at 527. The court concluded that ownership is thus a "jurisdictional" fact and, citing *United States v. Mine Workers*, 330 U.S. 258, noted that "[it] is axiomatic that the federal courts have jurisdiction to determine jurisdiction." 459 F.Supp., at 527. The court held that no Eleventh Amendment bar existed because "[this] Court finds as fact that the Division of Archives is not and never was the rightful owner of the articles of salvage from the ship *Atocha* that were seized by the ancillary warrant of arrest and which have been improperly removed and held by the Division of Archives; that the Division of Archives is not the owner of any right or interest in such property based upon the purported and invalid contract with Treasure Salvors; and that the Division of Archives was wrongfully withholding a portion of the *res* of the *Atocha* over which this Court was properly exercising *in rem* jurisdiction." *Ibid.*

On the basis of its memorandum, the court

"ORDERED and ADJUDGED and DECREED that Treasure Salvors, Inc. and Armada Research Corp. have full right and title to articles arrested and that they are entitled to possession and that the United States Marshal, who has possession and control of such articles, shall deliver them to Treasure Salvors, Inc. and Armada Research Corp." App. 85.

Pursuant to this order, Treasure Salvors eventually received -- under certain restrictions -- the artifacts that the State held as custodian for the court. Record 554.

----- End Footnotes -----

[*682] The **[***1067]** Court of Appeals affirmed. 621 F.2d 1340 (CA5 1980). As had the District Court, see n. 14, *supra*, the court concluded that the Eleventh Amendment did not prevent the court from resolving the controverted claims to ownership of the *res*, since resolution of that dispute was essential to a determination of whether the Eleventh Amendment in fact barred an exercise of jurisdiction by the federal court. 621 F.2d, at 1345. n15 The court then held that the extraterritorial process issued pursuant to Supplemental Admiralty Rule C(5) was proper, *id.*, at 1346, and that the State did not have a valid claim to the property. *Id.*, at 1349. n16

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n15 The court noted that this result was particularly compelling in admiralty *in rem* actions. The court reasoned that, since federal courts have exclusive jurisdiction over such actions, if the mere assertion of ownership by a State were sufficient to invoke the Amendment, petitioners such as Treasure Salvors would be stranded without a forum in which to litigate their claim. 621 F.2d, at 1346, n. 19.

n16 The court neither affirmed nor reversed the District Court's holding that Florida was in privity with the United States and therefore bound by the earlier decision of the Court of Appeals. *Id.*, at 1344, n. 17.

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The Florida Department of State filed a petition for writ of certiorari, presenting only one question: "Whether the Eleventh Amendment to the United States Constitution bars an in rem admiralty action seeking to recover property owned by a state." Pet. for Cert. I. We granted the petition. 451 U.S. 982. We hold that the federal court had jurisdiction to secure possession of the property from the named state officials, since they had no colorable basis on which to retain possession of the artifacts. The court did not have power, however, to adjudicate the State's interest in the property without the State's consent.

[*683] II

Stripped of its procedural complexities and factual glamor, this case presents a narrow legal question. The District Court attempted to seize artifacts held by state officials and to bring the property within its admiralty *in rem* jurisdiction. Although the seizure in this case was extraterritorial, and thus involved an application of Supplemental Admiralty Rule C(5), the question presented for our decision would not be any different if the State merely resisted an attachment of property located within the district.

In response to the warrant of arrest, the State contended that it was immune from the federal process **[***1068]** under the Eleventh Amendment. n17 It argued that the contracts **[**3314]** executed with Treasure Salvors "alone determined the rights and obligations of the contracting parties" App. 44. The difficult question presented in this case is whether a federal court exercising admiralty *in rem* jurisdiction may seize property held by state officials under a claim that the property belongs to the State. n18

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n17 ^{HN1} The Eleventh Amendment provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Although the Amendment does not literally apply to actions brought against a State by its own citizens, the Amendment long has been held to govern such actions. *Hans v. Louisiana*, 134 U.S. 1. See *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 280; *Edelman v. Jordan*, 415 U.S. 651, 662. Nor does the Amendment literally apply to proceedings in admiralty. Again, however, the Court has found it to govern certain admiralty actions. See *In re New York*, 256 U.S. 490, 500.

n18 The fact that the State appeared and offered defenses on the merits does not foreclose consideration of the Eleventh Amendment issue; "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar" that it may be raised at any point of the proceedings. *Edelman v. Jordan*, *supra*, at 678; see *Ford Motor Co. v. Department of*

Treasury, 323 U.S. 459, 467 ("The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court").

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[*684] A suit generally may not be maintained directly against the State itself, or against an agency or department of the State, unless the State has waived its sovereign immunity. *Alabama v. Pugh*, 438 U.S. 781. If the State is named directly in the complaint and has not consented to the suit, it must be dismissed from the action. *Id.*, at 782. n19 Of course, the fact that the State should have been dismissed from an action that has proceeded to judgment does not mean that the judgment may not stand against other parties who are not immune from suit. n20

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n19 But see *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 ("Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts"); see also *Hutto v. Finney*, 437 U.S. 678; *Maher v. Gagne*, 448 U.S. 122.

n20 Thus, in *Alabama v. Pugh*, our holding that the State of Alabama and the Alabama Board of Corrections should have been dismissed as parties did not affect the substance of the relief granted against a number of Alabama officials responsible for the administration of its prison system.

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The Eleventh Amendment does not bar all claims against officers of the State, even when directed to actions taken in their official capacity and defended by the most senior legal officers in the executive branch of the state government. In *Ex parte Young*, 209 U.S. 123, the Court held that an action brought against a state official to enjoin the enforcement of an unconstitutional state statute is not a suit against a State barred by the Eleventh Amendment. In response to the argument that the official in such a case could act only as an officer of the State and that the suit therefore could be characterized only *****1069** as an action against the State itself, the Court explained:

"The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce **[*685]** an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce is a violation of the Federal Constitution, the officer in proceeding under such enactment comes into *****3315** conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Id.*, at 159-160.

There is a well-recognized irony in *Ex parte Young*; unconstitutional conduct by a state officer may be "state action" for purposes of the Fourteenth Amendment yet not attributable to the State for purposes of the Eleventh. Nevertheless, the rule of *Ex parte Young* is one of the cornerstones of the Court's Eleventh Amendment jurisprudence. See *Edelman v. Jordan*, 415 U.S. 651, 663-664; *Quern v. Jordan*, 440 U.S. 332, 337.

In *Tindal v. Wesley*, 167 U.S. 204, the Court applied the analysis later enshrined in *Ex parte Young* in a suit to recover property wrongfully held by state officials on behalf of the State of South Carolina. In *Tindal*, the plaintiff claimed title and a right of possession to certain real property held by a state official; the defendant answered that the property belonged to the State and asserted the Eleventh Amendment as a defense to the action. The Court described the issue presented for decision:

"So that the question is directly presented, whether an action brought against individuals to recover the possession of land of which they have actual possession and control, **[*686]** is to be deemed an action against the State within the meaning of the Constitution, simply because those individuals claim to be in rightful possession as officers or agents of the State, and assert title and right of possession in the State. Can the court, in such an action, decline to inquire whether the plaintiff is, in law, entitled to possession, and whether the individual defendants have any right, in law, to withhold possession? And if the court finds, upon due inquiry, that the plaintiff is entitled to possession, and that the assertion by the defendants of right of possession and title in the State is without legal foundation, may it not, as between the plaintiff and the defendants, adjudge that the plaintiff recover possession?" 167 U.S., at 212.

Relying extensively on the earlier decision in *United States v. Lee*, 106 U.S. 196, n21

[*1070]** the Court in *Tindal* held that the "settled doctrine of this court wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against the State simply because the defendant holding possession happens to be an officer of the State and **[*687]** asserts that he is lawfully in possession on its behalf." 167 U.S., at 221. The Court refused to accept the proposition that the "doors of the courts of justice are . . . closed against one legally entitled to possession, by the mere assertion of the defendants that they are entitled to possession for the State." *Id.*, at 222. In explaining the extent of its decision, the Court stated:

"[The] Eleventh Amendment gives no immunity to officers or agents of a State in **[**3316]** withholding the property of a citizen without the authority of law. And when such officers or agents assert that they are in rightful possession, they must make good that assertion when it is made to appear in a suit against them as individuals that the legal title and right of possession is in the plaintiff. If a suit against officers of a State to enjoin them from enforcing an unconstitutional statute, whereby the plaintiff's property will be injured . . . be not one against the State, it is impossible to see how a suit against the same individuals to recover the possession of property belonging to the plaintiff and illegally withheld by the defendants can be deemed a suit against the State." *Ibid.* n22

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n21 In *Lee*, the plaintiff brought an action in ejectment in federal court to recover the Virginia estate of General Robert E. Lee. The estate had been acquired by the United States for nonpayment of taxes, although the taxes in fact had been tendered by a third party. Once in possession, the Government had established a federal military installation and a national cemetery on the property. The plaintiff brought suit against the governmental custodians of

the estate, who pleaded the sovereign immunity of the United States as a defense. This Court upheld a trial court judgment in favor of the plaintiff, on the ground that the defendants' possession of the estate was unlawful. The Court held that a suit against the federal officers under such circumstances was not a suit against the sovereign. Although *Lee* involved the sovereign immunity of the United States, the Court in *Tindal* stated that "it cannot be doubted that the question whether a particular suit is one against the State, within the meaning of the Constitution, must depend upon the same principles that determine whether a particular suit is one against the United States." 167 U.S., at 213.

n22 The Court continued:

"Any other view leads to this result: That if a State, by its officers, acting under a void statute, should seize for public use the property of a citizen, without making or securing just compensation for him, and thus violate the constitutional provision declaring that no State shall deprive any person of property without due process of law, *Chicago, Burlington &c. Railroad v. Chicago*, 166 U.S. 226, 236, 241, the citizen is remediless so long as the State, by its agents, chooses to hold his property; for, according to the contention of the defendants, if such agents are sued as individuals, wrongfully in possession, they can bring about the dismissal of the suit by simply informing the court of the official character in which they hold the property thus illegally appropriated." *Id.*, at 222.

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In holding that the action was not barred by the Eleventh Amendment, the Court in *Tindal* emphasized that any judgment awarding possession to the plaintiff would not subsequently **[*688]** bind the State. "It is a judgment to the effect only that, as between the plaintiff and the defendants, the former is entitled to possession of the property in question, *****1071** the latter having shown no valid authority to withhold possession from the plaintiff," *id.*, at 223; "it will be open to the State to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute." *Ibid.*

The rule of law set forth in *United States v. Lee* and *Tindal v. Wesley* was clarified in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682. In that case the plaintiff brought suit against a Government official to compel specific performance of a contract. n23 The plaintiff theorized that by withholding delivery of property as required by the contract the agent had exceeded his official authority and could be sued in federal court. The Court in *Larson* stated that "the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in a particular case, are constitutionally void." *Id.*, at 701-702. The Court held that the fact that an officer wrongfully withholds property belonging to another does not necessarily establish that he is acting beyond the permissible scope of his official capacity. n24 Since **[*689]** in *Larson* it was not alleged that the *****3317** Government official had exceeded his statutory authority -- indeed, the plaintiff had affirmatively contended that the officer had authority to bind the Government on the contract at issue n25 -- or that the exercise of such authority was unconstitutional, n26 the *****1072** Court held that the action was barred by sovereign immunity.

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n23 The plaintiff had contracted to purchase surplus coal from the War Assets

Administration; the Administrator of that agency had withheld delivery and entered a new contract to sell the coal on the ground that the plaintiff had failed to perform a condition precedent to delivery. The plaintiff contended that title to the coal had passed at the time the contract was made, so that the Administrator was wrongfully withholding property that belonged to him.

n24 The Court stated:

"The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet [the requirement that the action to be restrained or directed is not action of the sovereign]. True, it establishes a wrong to the plaintiff. But it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign. If he is exercising such powers, the action is the sovereign's and a suit to enjoin it may not be brought unless the sovereign has consented." 337 U.S., at 693.

The Court explicitly rejected the argument that "the commission of a tort cannot be authorized by the sovereign." *Ibid.*; see also *id.*, at 695.

n25 The Court found that the Administrator "was empowered by the sovereign to administer a general sales program encompassing the negotiation of contracts, the shipment of goods and the receipt of payment." *Id.*, at 692. "A normal concomitant of such powers, as a matter of general agency law, is the power to refuse delivery when, in the agent's view, delivery is not called for under a contract and the power to sell goods which the agent believes are still his principal's to sell." *Ibid.* The Court also noted that the "very basis of the respondent's action is that the Administrator was an officer of the Government, validly appointed to administer its sales program and therefore authorized to enter, through his subordinates, into a binding contract concerning the sale of the Government's coal." *Id.*, at 703.

n26 The Court held that there could be no claim that the Administrator's actions constituted an unconstitutional taking of property without compensation because the plaintiff had a remedy, in a suit for breach of contract, in the Court of Claims. *Id.*, at 703, n. 27.

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These cases make clear that the Eleventh Amendment does not bar an action against a state official that is based on a theory that the officer acted beyond the scope of his statutory authority or, if within that authority, that such authority is unconstitutional. In such an action, however, the Amendment places a limit on the relief that may be obtained by the plaintiff. If the action is allowed to proceed against the officer only because he acted without proper authority, the judgment may not compel the State to use its funds to compensate the plaintiff for the injury. In *Edelman v. Jordan*, 415 U.S. 651, the Court made clear that "a suit by private [*690] parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Id.*, at 663. See *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459; *Quern v. Jordan*, 440 U.S., at 337. n27 In determining the relief that may be granted if a state officer is found to have acted without valid statutory authority, the question is whether the relief "[constitutes] permissible prospective relief or a 'retroactive award which requires the payment of funds from the state treasury.'" *Quern v. Jordan*, *supra*, at 346-347.

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n27 This principle is not absolute. As noted, n. 19, *supra*, Congress may authorize a suit against a State -- pursuant to § 5 of the Fourteenth Amendment -- that would entail the payment of public funds from the state treasury. *Fitzpatrick v. Bitzer*, 427 U.S. 445; *Hutto v. Finney*, 437 U.S. 678. Moreover, a prospective decree that has an "ancillary effect" on the state treasury "is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*." *Edelman v. Jordan*, 415 U.S., at 668; see also *Milliken v. Bradley*, 433 U.S. 267, 288. Finally, "[while] it is clear that the doctrine of *Ex parte Young* is of no aid to a plaintiff seeking damages from the public treasury . . . damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office." *Scheuer v. Rhodes*, 416 U.S. 232, 238.

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III

In light of the principles set forth above, the proper resolution of the Eleventh Amendment issue raised in this case requires an answer to each of three specific questions: (a) Is this action asserted against officials of the State or is it an action brought directly against the State of Florida itself? (b) Does the challenged conduct of state officials constitute an **ultra vires** or unconstitutional withholding of property or merely a tortious interference with property rights? (c) Is the relief sought by Treasure Salvors permissible prospective relief or is it analogous to a retroactive award that requires "the payment of funds from the state treasury"?

[*691] [3318] A**

Treasure Salvors filed this admiralty *in rem* action in federal court, seeking a declaration of title to an abandoned sailing vessel that had been discovered on the ocean floor. The State of Florida was not named as a party and was not compelled to appear. Some of the property at issue, however, was held by officials of the Florida Division of Archives. Asserting that it was the rightful **[***1073]** owner of the property, Treasure Salvors filed a motion "for an Order commanding the United States Marshal to arrest and take custody of those portions of the Plaintiffs' vessel now being held by L. Ross Morrell or James McBeth or being held under their custody, care or control." App. 11. n28 As requested, the District Court issued a warrant of arrest commanding the Marshal of the United States for the Southern District of Florida "to take into your possession the portions of said vessel which have been in the possession or are in the possession of L. Ross Morrell and/or James McBeth, or under their custody, care or control and to bring said portions of said vessel within the jurisdiction of this Honorable Court and transfer possession of same to the substitute custodian appointed in this action." *Id.*, at 41-42. It is this process from which the State contends it is immune under the Eleventh Amendment. n29

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n28 The motion identified L. Ross Morrell as the Director of the Division of Archives and James McBeth as the Bureau Chief of the Historical Museum of the Division of Archives. App. 15.

n29 As noted, the State immediately filed a motion to quash the warrant. *Id.*, at 43. Although that effort failed, the State asserted an Eleventh Amendment defense in its attempt to defeat a transfer of the property -- and thus ultimate execution of the warrant -- to

Treasure Salvors. Record 422.

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It is clear that the process at issue was directed only at state officials and not at the State itself or any agency of the State. n30 Neither the fact that the State elected to defend on [*692] behalf of its agents, nor the fact that the District Court purported to adjudicate the rights of the State, deprived the federal court of jurisdiction that had been properly invoked over other parties. See *Alabama v. Pugh*, 438 U.S. 781; n. 20, *supra*. The process thus is not barred by the Eleventh Amendment as a direct action against the State.

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n30 As noted, n. 11, *supra*, Treasure Salvors filed a supplemental complaint seeking a declaratory judgment that its contracts with the State were void. This action might be characterized as an action against the State itself. The District Court emphasized, however, that "the warrant was *not* issued in response to Treasure Salvors' Supplemental Complaint for Declaratory Judgment and Other Relief which was filed April 17, 1978." 459 F.Supp., at 526 (emphasis in original).

The order to show cause entered by the District Court was addressed directly to the State of Florida. See App. 63. That order was issued, however, only after the State itself had filed a motion to quash the warrant. *Id.*, at 43 ("COMES NOW, the State of Florida, by and through the undersigned counsel, and moves this Court to set aside and quash the warrant for arrest in rem issued against the State of Florida at the request of Plaintiffs herein . . ."). The order to show cause did not alter the fact that the process resisted by the State on Eleventh Amendment grounds was directed only at state officials.

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B

The second question that must be considered is whether the state officials named in the warrant acted without legitimate authority in withholding the property at issue. In Treasure Salvors' first response to the State's Eleventh Amendment argument, it contended:

"If the Division of Archives were allowed to retain this property, its officials would be acting outside the scope of their authority under state law since the state statute under which they claim [does] not apply outside the states territory. The rationale of *Home Tel. & Tel. Co. v. Los Angeles*, [227 U.S. 278 (1913),] prohibits [***1074] this result since to allow such action would be to deprive Treasure Salvors of their property without due process in violation [*693] of the [***3319] Fourteenth Amendment to the Constitution of the United States." Record 472.

Thus from the outset, Treasure Salvors has asserted that state officials do not have valid statutory authority to hold the property at issue.

In *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, this Court held that the actions of a federal official in withholding the delivery of goods pursuant to his interpretation of a disputed provision of a contract constituted at most a tortious deprivation of property. The proper remedy for the plaintiff was not an action in district court to compel delivery, but

a suit for breach of contract in the Court of Claims. Actions of the Government official pursuant to legitimate contractual authority were neither **ultra vires** nor unconstitutional.

From the outset of the proceedings at issue here, the State of Florida has advanced the contracts that it executed with Treasure Salvors as a defense to the federal court's attempt to secure possession of the artifacts held by the named state officials. It is noteworthy, however, that the State has never argued that the contracts conferred upon the State a right of ownership in the artifacts; the contracts simply "determined the rights and obligations of the contracting parties" App. 44. The State has argued that the contracts are valid and "in no way affected" by the decision of this Court in *United States v. Florida*, 420 U.S. 531. App. 44. n31

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n31 In this Court the State has asserted that the issue on the merits involves a determination of the validity of the contracts. See *post*, at 712, n. 9. But the State has not identified any language in the contracts that provides even a colorable basis for a claim that the State has an ownership interest in the artifacts.

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We are not called upon in this case to determine "the rights and obligations" of two parties to a contract. The issue presented [***694**] is whether state officials had authority to refuse to surrender possession of the artifacts to the District Court. The salvage contracts are not relevant to that question unless they provide a basis upon which the officials may claim a right to withhold possession of the property. Unless the contracts determine rights of the parties to the property, they are collateral to the issue before us.

It is apparent that the State does not have even a colorable claim to the artifacts pursuant to these contracts. The contracts did not purport to transfer ownership of any artifacts to the State; they permitted Treasure Salvors "to conduct underwater salvage from and upon certain submerged sovereignty lands of and belonging to the State of Florida," *id.*, at 20-21, "for the purpose of salvaging abandoned vessels or the remains thereof . . . which abandoned material is the property of the State of Florida." *Id.*, at 22 (emphasis added). The contracts provided for the performance of services on property that was believed to belong *in toto* to the State of Florida, in exchange for which the State agreed to "award to the Salvager seventy-five percent (75%) of the total appraised value of all material recovered

[*****1075**] " *Id.*, at 33. The State did not "yield" its claim to 75% of the artifacts in order to receive an undisputed right to the remaining 25%; the State agreed to pay Treasure Salvors the equivalent of 75% of the proceeds in compensation for the difficult and expensive work undertaken by Treasure Salvors in retrieving from the floor of the ocean property that was believed to belong to the State.

The salvage contracts might well provide a basis for a claim to the property by Treasure Salvors; for the contracts did purport to transfer a portion of the artifacts *from* the State to Treasure Salvors in compensation for the latter's services. Treasure Salvors does claim a right to ownership, but based entirely on the fact that it was the finder of abandoned property and therefore entitled to the property independently [****3320**] of [***695**] the contracts. n32 Thus neither party's rights to ownership is affected in any way by the salvage contracts; whether the contracts are valid or not, they provide no authority for the refusal of state officials to surrender possession of the artifacts.

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n32 This case is thus unlike *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, in which the plaintiff asserted a right to the property pursuant to the very contract that it contended the Government official had breached without authority. Treasure Salvors claims ownership of the res on the ground that the property was abandoned by the former owner, and discovered by Treasure Salvors, on the Continental Shelf of the United States in international waters. See n. 8, *supra*.

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The authority of state officials to claim the artifacts was derived solely from ^{HN2} Fla. Stat. § 267.061(1)(b) (1974), which provided:

"It is further declared to be the public policy of the state that all treasure trove, artifacts and such objects having intrinsic or historical and archaeological value *which have been abandoned on state-owned lands or state-owned sovereignty submerged lands* shall belong to the state with the title thereto vested in the division of archives, history and records management of the department of state for the purpose of administration and protection." (Emphasis added.)

This Court has determined, however, that the *Atocha* was not found on "state-owned sovereignty submerged lands." Rather, it was discovered on the Outer Continental Shelf of the United States, beneath international waters. n33

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n33 In this Court the State has advanced the argument that its boundaries for purposes of rightful ownership of sunken ships extend further than its boundaries for purposes of ownership of mineral resources. This argument was not raised in the petition for certiorari, is foreclosed by our prior determination of the State's boundaries, see n. 5, *supra*, and is refuted by the State's own conduct in this case. The State has never attempted to claim ownership of the property that Treasure Salvors has continued to recover since the expiration of the contracts. Given the State's vigorous defense of the relatively few artifacts at issue in this case, it is difficult to imagine that the State idly would permit Treasure Salvors to pirate other treasure that rightfully belonged to the State.

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[*696] No statutory provision has been advanced that even arguably would authorize officials of the Division of Archives to retain the property at issue. Throughout this litigation, the State has relied solely on the contracts that it executed with Treasure Salvors as a defense to the federal court's process; those contracts were predicated entirely on a state statute that on its face is inapplicable in **[***1076]** this case. n34 Actions of state officials in holding property on the assumption that it was found on state land and *for that reason* belongs to the State -- when it is undisputed that the property was *not* found on state land -- is beyond the authority of any reasonable reading of any statute that has been cited to us by the State. n35

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n34 The fact that the contracts were executed on the basis of a mistaken understanding concerning the ownership of the *Atocha* cannot, of course, provide Florida with a colorable

claim of ownership. For if the mistake had not occurred, it would have been apparent from the outset that Treasure Salvors had no reason to enter into a contract with Florida or any other stranger to the transaction. The State of Florida has never contended that it would benefit from a reformation of the contracts; Treasure Salvors' position does not depend on any change in the terms of the contracts. The Eleventh Amendment analysis in this case does not require any consideration of the doctrine of mistake.

n35 Although the State in this case relies only on the disputed contracts -- and not on any statutory provision -- we note that Fla. Stat. § 267.061(2)(a) (1981) provides generally that it is the responsibility of the Division of Archives to "[locate], acquire, protect, preserve, and promote the location, acquisition, and preservation of historic sites and properties, buildings, artifacts, treasure trove, and objects of antiquity which have scientific or historical value or are of interest to the public, including, but not limited to, monuments, memorials, fossil deposits, Indian habitations, ceremonial sites, abandoned settlements, caves, sunken or abandoned ships, or any part thereof." Surely this section does not authorize state officials, however, to seize and hold historical artifacts at will wherever they are found.

- - - - - End Footnotes - - - - -

As recognized in *Larson*, ^{HN3} "action of an officer of the sovereign (be it **[**3321]** holding, taking or otherwise legally affecting the **[*697]** plaintiff's property)" that is beyond the officer's statutory authority is not action of the sovereign, 337 U.S., at 701; a suit for specific relief against the officer is not barred by the Eleventh Amendment. This conclusion follows inevitably from *Ex parte Young*. If conduct of a state officer taken pursuant to an unconstitutional state statute is deemed to be unauthorized and may be challenged in federal court, conduct undertaken without any authority whatever is also not entitled to Eleventh Amendment **immunity**.

If a statute of the State of Florida were to authorize state **officials** to hold artifacts in circumstances such as those presented in this case, a substantial constitutional question would be presented. In essence, the State would have authorized state officials to retain property regardless of the manner in which it was acquired, with no duty to provide compensation for a public taking. If the Constitution provided no protection against such unbridled authority, all property rights would exist only at the whim of the sovereign.

Thus, since ^{HN4} the state officials do not have a colorable claim to possession of the artifacts, they may not invoke the Eleventh Amendment to block execution of the warrant of arrest. Of course, the warrant itself merely secures possession of the property; its execution does not finally adjudicate the State's right to the artifacts. See *Tindal v. Wesley*, 167 U.S., at 223. In ruling that the Eleventh Amendment does not bar execution of the warrant, we need not decide the extent to which a federal district court exercising admiralty *in rem* jurisdiction over property before the court may adjudicate the rights of claimants to that property as against sovereigns that did not appear **[***1077]** and voluntarily assert any claim that they had to the res.

C

Finally, it is clear that the relief sought in this case is consistent with the principles of *Edelman v. Jordan*, 415 U.S. 651. **[*698]** The arrest warrant sought possession of specific property. It did not seek any attachment of state funds and would impose no burden on the state treasury.

This case is quite different from *In re New York (I)*, 256 U.S. 490, and *In re New York (II)*,

256 U.S. 503, relied on by the State. In *In re New York (I)*, the plaintiff brought an action in federal court to recover damages caused by canal boats chartered by the State of New York. Pursuant to admiralty practice, the action was brought *in rem* against the vessels themselves. The owner of the vessels answered the complaint, contending that the action should be directed against the Superintendent of Public Works of the State of New York. The District Court agreed and ordered the Superintendent to appear and answer; in the event that he could not be found the court directed that "the goods and chattels of the State of New York used and controlled by him" should be attached. 256 U.S., at 496.

The Attorney General of the State appeared on behalf of the Superintendent and asserted the Eleventh Amendment as a defense to the action. This Court held that the District Court lacked jurisdiction to proceed against the Superintendent. The Court noted that "the proceedings against which prohibition is here asked have no element of a proceeding *in rem*, and are in the nature of an action *in personam* against Mr. Walsh, not individually, but in his capacity as Superintendent of Public Works of the State of New York," *id.*, at 501; moreover, "[there] is no suggestion that the Superintendent was or is acting under color of an unconstitutional law, or otherwise than in the due course of his duty under the constitution and laws of the State of New York." *Id.*, at 502. The Court concluded: "In the fullest sense, therefore, the proceedings are shown by the entire record to be in their nature and effect suits brought by individuals against the State of *****3322** New York, and therefore -- since no consent has been given -- beyond the jurisdiction of the courts of the United States." *Ibid.*

[*699] In *In re New York (II)*, the plaintiff filed an action in admiralty to recover damages caused by the negligent operation of a canal boat *owned* by the State of New York. The action was brought *in rem* and the vessel was arrested. This Court held, as it had in *In re New York (I)*, that the federal court lacked jurisdiction to adjudicate the claim. In broad language urged upon us here, the Court stated that property owned by a State and employed solely for governmental uses was exempt from seizure by admiralty process *in rem*. 256 U.S., at 511. The force of the holding in *In re New York (II)*, however, is that an action -- otherwise barred as an *in personam* action against the State -- cannot be maintained through seizure of property owned by the State. Otherwise, the Eleventh Amendment could easily be circumvented; *****1078** an action for damages could be brought simply by first attaching property that belonged to the State and then proceeding *in rem*.

In these cases the plaintiff did not claim an ownership interest in the vessels and did not question the State's assertion of ownership. The sole purpose of the attempted arrests was to enable the court to acquire jurisdiction over a damages claim that was otherwise barred by the Eleventh Amendment. In this case Treasure Salvors is not asserting a claim for damages against either the State of Florida or its officials. The present action is not an *in personam* action brought to recover damages from the State. The relief sought is not barred by the Eleventh Amendment.

IV

The Eleventh Amendment thus did not bar the process issued by the District Court to secure possession of artifacts of the *Atocha* held by the named state officials. The proper resolution of this issue, however, does not require -- or permit -- a determination of the State's ownership of the artifacts.

[*700] This resolution of the immunity issue is not consistent with the disposition of the Court of Appeals. The court properly held that the Eleventh Amendment did not bar execution of the warrant of arrest; in making that determination, however, the Court of Appeals improperly adjudicated the State's right to the artifacts. While such an adjudication would be justified if the State voluntarily advanced a claim to the artifacts, it may not be justified as part of the Eleventh Amendment analysis, the only issue before us.

For these reasons, the judgment of the Court of Appeals must be affirmed in part and reversed in part. To the extent that the court held that the Eleventh Amendment did not prohibit an execution of the warrant and transfer of the artifacts to Treasure Salvors, its judgment is affirmed. To the extent that the court determined the State's ownership of the artifacts as part of its Eleventh Amendment analysis, its judgment is reversed.

It is so ordered.

CONCURBY: BRENNAN (In Part); WHITE (In Part)

DISSENTBY:

BRENNAN (In Part); WHITE (In Part)

DISSENT: JUSTICE BRENNAN, concurring in the judgment in part and dissenting in part.

I agree with the plurality that the Eleventh Amendment prohibited neither an execution of the warrant nor a transfer to respondents of the artifacts at issue in this case. See *ante*, at 699 and this page. My rationale for this conclusion differs from the plurality's, however. Both respondents are corporations organized under the laws of the State of Florida. Thus this suit is not "commenced or prosecuted against one of the United States by citizens of *another* State." U.S. Const., Amdt. 11 (emphasis added). The plurality asserts that this constitutional provision "long has been held to govern" "actions brought against a State by *its own* citizens." *Ante*, at 683, n. 17 (emphasis added), citing *Hans v. Louisiana*, 134 U.S. 1 (1890). I have long taken the view that *Hans* did *not* rely upon the Eleventh Amendment, and that that Amendment does *not* bar federal court suits against a [*701] [**3323] State when brought by its own citizens. See *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 309-322 [***1079] (1973) (dissenting opinion); *Edelman v. Jordan*, 415 U.S. 651, 687 (1974) (dissenting opinion). I adhere to this view, and I therefore believe that the Eleventh Amendment is wholly inapplicable in the present case. * To this extent, I am in agreement with the plurality's disposition.

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* For this reason, I cannot agree with footnote 17 of the plurality's opinion. To the extent, however, that the plurality concludes that the judgment of the Court of Appeals should be affirmed because the State of Florida does not have even a colorable claim to the artifacts, I agree with its opinion.

----- End Footnotes-----

I disagree, however, with the plurality's conclusion that the courts below erred when they "determined the State's ownership of the artifacts as part of [their] Eleventh Amendment analysis." *Ante*, at 700. The record before us plainly indicates that the State had a full opportunity to present its arguments respecting ownership of the artifacts at issue in this case when the action was in the District Court, and that that court held a full evidentiary hearing on the merits of these arguments. See *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 459 F.Supp. 507, 521 (SD Fla. 1978); 621 F.2d 1340, 1344 (CA5 1980). The State's arguments were rejected in the District Court, and that rejection was affirmed by the Court of Appeals. The plurality today appears to agree with the courts below that the arguments available to the State on the merits were, and are, insubstantial. *Ante*, at 694-697. "No statutory provision has been advanced that *even arguably would authorize* officials of the Division of Archives to retain the property at issue," *ante*, at 696 (emphasis added), and "the State *does not have even a colorable claim to the*

artifacts" pursuant to its contracts with respondents, ante, at 694 (emphasis added). Given such legal conclusions, I fail to see any need to reverse the determination by the courts below of the State's ownership, as the plurality prescribes, ante, at 700. [*702] I do understand that the plurality does not remand this action for a determination of the State's ownership, and rather simply reverses the judgment below on this point. But the fact remains that the courts below have already determined the merits of the State's claim: Even if they were incorrect to make that determination at the time that they did, why should that fact invalidate that determination? Why should the State now get a second bite at the apple?

In sum, I would affirm the judgment of the Court of Appeals in its entirety.

JUSTICE WHITE, with whom JUSTICE POWELL, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, concurring in the judgment in part and dissenting in part.

The essence of this litigation is a dispute between the State of Florida and one of its citizens over ownership of treasure. The Eleventh Amendment precludes federal courts from entertaining such suits unless the State agrees to waive its Eleventh Amendment immunity. Because it is the State itself which purports to own the controverted treasure, and because the very nature of this suit, as defined in the [***1080] complaint and recognized by both the District Court and Court of Appeals, is to determine the State's title to such property, this is not a case subject to the doctrine of Ex parte Young, 209 U.S. 123 (1908). In short, this is a suit against the State of Florida, without its permission. Moreover, were the suit to be characterized as one against only state agents, I would find that contract with the State provided a colorable basis upon which the agents could hold the property.

The Court of Appeals, like the District Court, thought that the jurisdictional issue raised by the State merged with a determination on the merits of the validity of the State's claim to the property. The appellate court believed that it had "jurisdiction [***3324] to decide jurisdiction" and could therefore determine who owned the artifacts in order to ascertain whether the suit was, in fact, an action against the State. [*703] By holding that "[the] court did not have power . . . to adjudicate the State's interest in the property without the State's consent," ante, at 682, the Court properly rejects this novel conception of the Eleventh Amendment. * The appellate court's approach to the jurisdictional issue is not consistent with our prior cases; it incorrectly assumes that a federal court may adjudicate a State's right to ownership of specific property within the possession of state officials without the State's consent. The approach is unsatisfactory because, as Judge Rubin noted in dissent, it "is equivalent to asserting that suits against a state are permitted by the eleventh amendment if the result is that the state loses." 621 F.2d 1340, 1351 (CA5 1980). Although disagreeing with the Court of Appeals' Eleventh Amendment holding, the plurality nevertheless proceeds to conclude that the "State does not have even a colorable claim to the artifacts pursuant to [its] contracts" with respondents, ante, at 694, and that the state officials "have [no] colorable claim to possession of the artifacts." Ante, at 697. This for all practical purposes adjudicates the State's title, thus repeating the Eleventh Amendment error of the Court of Appeals.

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* I therefore concur in the judgment of the Court only insofar as it reverses the Court of Appeals' determination of the State's ownership of the artifacts. On this point, all Members of the Court, except JUSTICE BRENNAN, are in agreement.

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JUSTICE STEVENS' plurality opinion rests precariously on two transparent fictions. First, it

indulges in the fantasy that the enforcement of process by arrest of the res is somehow divorced from the action to determine the State's claim to the res -- a position contradicted by our own most apposite precedents, the two *In re New York* cases, 256 U.S. 490 (1921), and 256 U.S. 503 (1921). That dubious proposition is parlayed by a second fiction -- that Florida's Eleventh Amendment freedom from suit is meaningfully safeguarded by not formally rejecting the State's claim to the artifacts **[*704]** although federal agents may seize the contested property and federal courts may adjudicate its title. Neither of these novel propositions follows from *Ex parte Young, supra*. The rule of *Ex parte Young* is premised on the axiom that state officials cannot evade responsibility when their conduct "comes into conflict *****1081]** with the superior authority of [the] Constitution." *Id., at 159*. Today, the plurality dilutes the probative force behind that cornerstone decision by extrapolating it to allow federal courts to decide a property dispute between a State and one of its citizens, without the State's consent. For these reasons, as explained below, I dissent in part.

I

The Suit Is Against the State

The case is directly traceable to Treasure Salvors' filing of a motion in District Court for an order commanding the United States Marshal to arrest and take custody of the contested artifacts and to bring them within the jurisdiction of the court. Record 318. The roots of the case, however, rest in the earlier *in rem* action brought by Treasure Salvors to establish its title to the wreck and its bounty. The District Court held that possession and title rested with Treasure Salvors. *Treasure Salvors, Inc. v. Abandoned Sailing Vessel*, 408 F.Supp. 907, 911 (SD Fla. 1976). The Court of Appeals affirmed Treasure Salvors' ownership of all objects within the District Court's jurisdiction and to those objects outside its territory with respect to the United States. *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (CA5 1978) (*Treasure Salvors I*).

Treasure Salvors' subsequent request for an arrest warrant was predicated on this *****3325]** decision. n1 The warrant was to **[*705]** issue because it had already been decided that Treasure Salvors had "sole title and right to possession of the Defendant vessel." App. 13. Notwithstanding the Court of Appeals' limitation of its opinion to artifacts within the District Court's jurisdiction and to rights in the treasure asserted by the United States, Treasure Salvors sought enforcement of the judgment against the State of Florida. It did so on grounds that this Court's decision in *United States v. Florida*, 420 U.S. 521 (1975), removed Florida's right to the artifacts, and that Florida was privy to and bound by *Treasure Salvors I*.

"Inasmuch as the State of Florida [and its officers] were privy to this litigation, it is clear that [the district court] confirmed to the Plaintiffs' . . . title to and right to immediate and sole possession of the vessel . . . together with all her . . . cargo, wherever the same may be found." App. 18 (emphasis deleted).

In short, Treasure Salvors requested seizure of the artifacts in order to enforce an earlier judgment against the State. This is reason enough to conclude that the suit, and the accompanying warrant for arrest of the articles, were actions invoking federal judicial power against the State and not merely its agents.

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n1 "[The] plaintiffs . . . pursuant to the Final Judgment rendered by this Court February 19, 1976 and the Appellate Opinion rendered by the United States Court of Appeals for the Fifth

Circuit No. 76-2151, March 13, 1978, move this Court for an Order commanding the United States Marshal to arrest and take custody of those portions of the Plaintiff's vessel now being held by L. Ross Morrell or James McBeth or being held under their custody, care or control." App. 11.

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But even if this were not so, subsequent events reveal that the case is one against the State. After the State filed a motion to quash the **[**1082]** warrant, Treasure Salvors filed a supplemental complaint requesting that the contract be held void; it also requested that the District Court rule "[that] the State has no right, title or interest" in any portions of the *Atocha* in its possession. Record 371. The District Court then entered an order to show cause addressed directly to the State **[*706]** of Florida. App. 63. The State then argued that the Eleventh Amendment barred the suit. After rejecting all of the State's arguments, the District Court ordered that Treasure Salvors "have full right and title to articles arrested and that they are entitled to possession." *Id.*, at 85. The Court of Appeals affirmed this judgment.

I find the inescapable conclusion to be that this suit, as filed, litigated, and decided, was an action to determine the title of the State of Florida to the artifacts. n2 A suit of this type is at the heart of the Eleventh Amendment immunity.

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n2 The fact that the District Court did not issue its arrest warrant in response to Treasure Salvors' amended complaint is of little significance. It is the complaint which defines the nature of an action, and once accepted, an amended complaint replaces the original. Moreover, the adjudication of title either reflects that the ownership claim followed from the original complaint or constituted action upon the amended complaint.

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The line of cases culminating in *Ex parte Young*, 209 U.S. 123 (1908), are not to the contrary. In both *United States v. Lee*, 106 U.S. 196 (1882), and *Tindal v. Wesley*, 167 U.S. 204 (1897), the suits were against individual agents and did not purport to conclude the rights of the Government. As the Court correctly notes, *Tindal* made plain that a judgment awarding possession to the plaintiff would not subsequently bind the Government. Here the entire point of the *in rem* proceeding is to apply the judgment in *Treasure Salvors I* to erase the State's claim to the treasure. This is the only basis for issuance of the arrest warrant; it was the relief expressly requested by the respondents, and the relief subsequently granted by the District Court and the Court of Appeals.

My position is supported by the precedents closest to the instant case: the *In re New York* cases, 256 U.S. 490 **[**3326]** (1921), and 256 U.S. 503 (1921). The first *In re New York* decision arose from an *in rem* libel against the private owners of tugboats that had been at fault in collisions while chartered and operated by the State. The owners sought to bring in the Superintendent of Public Works who had entered into the **[*707]** charters on the State's behalf. The issue before this Court was whether the State could, without its consent, be impleaded in admiralty process in an action against private parties. The Court held that the "proceedings against which prohibition is here asked," *i. e.*, the attempt to implead the State, "have no element of a proceeding *in rem* and are in the nature of an action *in personam*" against a state officer. The purpose of this distinction was not to suggest that *in rem* actions could be brought against the State, or even that the original libel was not a true *in rem* cause, but rather to highlight that impleading of a state official, no less than a direct

action against the official, constituted a suit against a state officer in his "official capacity" and might require satisfaction out of *****1083** the property of New York. 256 U.S., at 501.

The second *In re New York* decision, a sovereign immunity case, made clear that a State's immunity extended to admiralty actions *in rem*.

"The principle so uniformly held to exempt the property of municipal corporations employed for public and governmental purposes from seizure by admiralty process *in rem*, applies with even greater force to exempt public property of a State used and employed for public and governmental purposes." 256 U.S., at 511.

The plurality's reading of *In re New York (II)* is that an action "otherwise barred as an *in personam* action against the State -- cannot be maintained through seizure of property owned by the State." *Ante*, at 699. n3 Nothing in the language of Justice Pitney's opinion supports this interpretation. Moreover, the libel brought before the Court in that case was a true *in rem* action; an action in admiralty to recover damages caused by a ship is a classic *in rem* action, although *****708** after the owners of the vessel are identified the libel often will be amended to include an *in personam* claim as well. G. Gilmore & C. Black, *Law of Admiralty* 498 (2d ed. 1975) (Gilmore & Black). Therefore, *In re New York (II)* is as "true" an *in rem* action as the instant case.

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n3 The plurality confuses the matter further by treating the cases as bearing on the question of whether a burden is imposed on the state treasury. The *In re New York* cases pertain instead to the initial issue of whether the action is against the State.

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The grounds of similarity between the cases are clear: in both cases *in rem* libels were filed and process by arrest was requested; in both suits the State by its Attorney General responded and indicated to the District Court that the property to be arrested was in the possession and ownership of the State, and therefore immune from seizure and attachment. In both cases, the District Court overruled the suggestion and awarded process *in rem*, authorizing the arrest of the res. When the seizure of the *Queen City* finally reached this forum, the Court stated that the property was exempt from seizure by admiralty process *in rem*. n4 The plurality's distinction *****3327** aside, the cases can be distinguished on but a *****1084** single relevant point: the fact that ownership of the res is contested here. That, of course, is the grounds on which the Court of *****709** Appeals decided the case -- a resolution which the plurality apparently rejects.

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n4 *In re New York (II)* was decided on straight sovereign immunity grounds: "[The] record -- aside from whether a suit in admiralty brought by private parties through process *in rem* against property owned by a State is not in effect a suit against the State, barred by the general principle applied in *Ex parte New York, No. 1*, No. 25, Original -- presents the question whether the proceeding can be based upon the seizure of property owned by a State and used and employed solely for its governmental uses and purposes." The Court went on to decide the vessel was immune from admiralty process, based upon "the law of nations" and "general grounds of comity and policy." 256 U.S., at 510.

In re New York (II)'s resolution on sovereign immunity grounds has several implications. First, as with other sovereign immunity decisions, it is direct support for determining what constitutes a suit against the State. *Ante*, at 686, n. 21. Cf. *Tindal v. Wesley*, 167 U.S. 204, 213 (1897). Second, it undercuts the plurality's analysis that the case merely stops roundabout circumvention of *In re New York (I)* through "first attaching property that belonged to the State and then proceeding *in rem*." *Ante*, at 699. As the above quoted passage indicates, the *In re New York (II)* Court did not need to go so far in order to find the suit barred.

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In re New York (I) indicates that the Eleventh Amendment will bar a suit that has the effect of proceeding against a state officer and involving the State's property. *In re New York (II)* squarely stands for the proposition that sovereign immunity bars process against a res in the hands of state officers. This is true even though an *in rem* action strictly proceeds against the vessel, and the owner of the vessel or artifacts is not an indispensable party. Significantly, *In re New York (II)* did not distinguish between the service of process to arrest the res and the thrust of the libel itself to determine the rights in the vessel. I follow that course in this case, and refuse to sever the attempt to arrest the artifacts from the attempt to decide their ownership.

The *In re New York* cases are particularly forceful because they reflect the special concern in admiralty that maritime property of the sovereign is not to be seized. This principle dates back to the English n5 and has not been significantly altered [*710] in this country. n6 The *In re New York* cases are but the most apposite examples of the line of cases concerning *in rem* actions brought against vessels in which an official of the State, the Federal Government, or a foreign government has asserted ownership of the res. The Court's consistent interpretation of the respective but related immunity doctrines pertaining to such vessels has been, upon proper presentation that the sovereign entity claims ownership of a res in its possession, to dismiss the suit or modify the judgment accordingly. n7

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n5 Under English law, no warrant for arrest will issue against any vessel in the actual service of a recognized foreign government. Significantly, this is so even if the suit itself is not barred. See, e. g., *The Messicano*, 32 T. L. R. 519 (1916). Where plaintiff sues *in rem* for possession "the writ will be dismissed, if a foreign recognized government claims the right to possession and is in the actual possession of the vessel, regardless of whether possession was rightfully or wrongfully obtained." Riesenfeld, *Sovereign Immunity of Foreign Vessels in Anglo-American Law: The Evolution of a Legal Doctrine*, 25 *Minn. L. Rev.* 1, 25 (1940). In *The Parlement Belge*, 5 P. D. 197, 220 (1880), the "leading authority" in England, it was held that "[if] the remedy sought by an action in rem against public property is, as we think it is, an indirect mode of exercising the authority of the Court against the owner of the property, then the attempt to exercise such an authority is an attempt inconsistent with the independence and equality of the state which is represented by such owner." Moreover, after a ship was declared by the foreign sovereign "to be in his possession as sovereign and to be a public vessel of the state," it was "very difficult to say that any Court can inquire by contentious testimony whether that declaration is or is not correct." *Id.*, at 219.

n6 For early cases, see *United States v. Peters*, 3 Dall. 121 (1795); *The Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812); *L'Invincible*, 1 Wheat. 238 (1816); *The Santissima Trinidad*, 7 Wheat. 283 (1822). In *The Siren*, 7 Wall. 152 (1869), the Court allowed a claim

against the proceeds of the vessel when sold, but stressed that no claim could be enforced while the Government owned the vessel. In *The Western Maid*, 257 U.S. 419 (1922), the Court, per Justice Holmes, went further and refused to allow a claim against a Government-owned vessel as enforceable either during Government ownership or thereafter. Shortly thereafter, sovereign immunity was expanded to embrace ships engaged solely in commerce. *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926).

n7 See Gilmore & Black 606-613. Only when a vessel is not in the sovereign's possession, is there controversy over the proper means by which the foreign government may assert its ownership. See *Compania Espanola de Navegacion Maritima v. The Navemar*, 303 U.S. 68 (1938).

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[**1085] Finally, the allowance of an *in rem* suit against arguably state-owned maritime [**328] property rests on the "personification" theory of the res -- that the action runs against the *Atocha* and not the State of Florida. This distinction between *in rem* and *in personam* actions has been decisively rejected. As the fiction of the personality of the ship declined, Gilmore & Black 615, 804-805, *in rem* actions were given *in personam* effect, and *in personam* judgments barred subsequent *in rem* actions. *Id.*, at 802, 613-614. See, e. g., *Burns Bros. v. Central R. Co. of New Jersey*, 202 F.2d 910 (CA2 1953) (L. Hand, J.). In short, under long-established admiralty law, [*711] arrest of sovereign maritime property is not tolerated, and an *in rem* suit directed at government property is an action against the State.

II

Holding of the Treasure by State Officials Was Not Ultra Vires

Alternatively, if the arrest of the artifacts was not, without more, a suit against the State, the action was nevertheless against state agents acting within their authority and holding property for the State under a colorable claim of right. It is settled that the Eleventh Amendment bars actions which are in effect against the State, even though the State is not the nominal party. *Louisiana v. Jumel*, 107 U.S. 711, 719-723, 727-728 (1883).

Leaving aside other possible bases by which the state officials had authority to refuse to surrender possession of the artifacts, I address the salvage contracts entered into between the State and Treasure Salvors. Under the contracts, which were renewed annually, Treasure Salvors was to conduct underwater salvage on Florida lands. By the terms of the contract, Treasure Salvors received 75% of the artifacts recovered. The State was to retain 25% of the representative artifacts. This arrangement was renewed on three occasions, the last contract being entered into on December 3, 1974. It was during that contract's duration that we decided *United States v. Florida*, 420 U.S. 531 (1975), which established Florida's boundaries along lines which placed the *Atocha* in international waters.

If it were not for this decision, it would be beyond cavil that Florida owned one-fourth of the artifacts pursuant to its ownership of the submerged land on which the *Atocha* rested as well as the contracts. It is also beyond reasonable dispute that the Eleventh Amendment bars a federal court from deciding the rights and obligations of a State in a contract unless the State consents. *Larson v. Domestic & Foreign* [*712] *Commerce Corp.*, 337 U.S. 682 (1949). The plurality does not take issue with this proposition. n8

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n8 "In *Larson* . . . this Court held that the actions of a federal official in withholding the delivery of goods pursuant to his interpretation of a disputed provision of a contract constituted at most a tortious deprivation of property. . . . Actions of the Government official pursuant to legitimate contractual authority were neither **ultra vires** nor unconstitutional." *Ante*, at 693.

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The **[**1086]** plurality treats this as a different case for two reasons. The first is that the State has never, in so many words, argued that the contracts conferred upon the State a right of ownership in the artifacts. *Ante*, at 693. While this may be true in the sense that Florida believed that it owned the artifacts even aside from the contracts, it is not true that Florida has not asserted that the contracts create an independent right to the treasure. Florida has repeatedly and expressly made precisely such a claim. n9

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n9 "At issue in the present case is both a contract and property right of the State of Florida to the artifacts previously in its possession" Brief for Petitioner 32; "The issue on the merits was whether the State had property rights to artifacts in its Archives -- that is, whether the contract to which the state was a party was valid." *Id.*, at 60. "The State of Florida has not claimed a lien on the artifacts; it has claimed ownership -- through fully executed contracts." Reply Brief for Petitioner 16-17. "The contract alone determined the rights and obligations of the contracting parties and was in no way affected by *United States v. Florida*." State's Motion to Quash Warrant for Arrest in Rem, App. 44.

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[3329]** The plurality's second argument is that the "State does not have even a colorable claim to the artifacts pursuant to these contracts." *Ante*, at 694. I disagree with this conclusion. The wording of the contract is reasonably interpretable as providing for a division of the recovered treasure. The intention of the parties upon the making of the contract, of course, governs the interpretation of the instrument. If *United States v. Florida, supra*, had placed the *Atocha* within Florida waters, it could not reasonably be argued that the contract did not constitute a valid basis for the State's **[*713]** claim to 25% of the artifacts. Both Treasure Salvors and the State entered into the contracts on the assumption that the *Atocha* rested in Florida waters. As it happened, the *Florida* decision upset that mutual assumption. This does not, however, inexorably mean that the contracts are so invalid as to render possession of the artifacts **ultra vires**. n10 Admiralty law may provide that such a mistake is not grounds for rescission of fully performed contracts in these circumstances. n11 The plurality's contention that the language of the contracts does not purport to transfer artifacts from Treasure Salvors to the State utterly ignores the concept of mistake. The notion of mistake would be read out of contract law if courts expected a contract, written under mistaken assumptions, to read as if the mistake had not occurred.

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n10 The plurality also suggests that the contracts "were predicated entirely on a state statute that on its face is inapplicable in this case." *Ante*, at 696. This no more than restates the plurality's characterization of the contracts. But it does highlight that the contracts' validity is called into question only by a mistaken assumption of law -- the statute's "[inapplicability]" after *United States v. Florida*, 420 U.S. 531 (1975).

n11 The inherent uncertainty in contracts for salvage has led admiralty courts to find few reasons that would justify reformation of a contract. See *The Elfrida*, 172 U.S. 186, 196 (1898) ("We do not think that a salvage contract should be sustained as an exception to the general rule, but rather that it should, *prima facie*, be enforced, and that it belongs to the defendant to establish the exception"). Gilmore & Black 582 ("Whether the gamble turns well or badly for the salvor, the 'no cure no pay' contract is everywhere recognized as enforceable, absent such invalidating causes as fraud and duress").

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Whether *****1087** the contracts are ultimately valid is beside the point. The existence of a colorable contractual claim to the artifacts, the presence of statutory authority for the State to enter into the contracts, and the ability to raise a mistake-of-law defense not rejectible on its face, is all that need be shown to indicate that possession of the artifacts by the state officials was not **ultra vires**. Although it would be too much ***714** to suggest that our Eleventh Amendment is crystal clear in all respects, this is, at least, the teaching of our most recent cases.

Larson v. Domestic & Foreign Commerce Corp., *supra*, is most directly apposite. There a private corporation brought suit in Federal District Court against the Administrator of the War Assets Administration, an agency of the United States Government, in his official capacity. The claim was that the Administration had sold certain surplus coal to the plaintiff, but had refused to deliver it and had made a new contract to sell it to others. A declaration was sought that the first contract was valid, the second contract invalid, and appropriate injunctive relief was requested. The Court held that the suit was against the United States and the District Court was therefore without jurisdiction to entertain it. The Court's decision rested on the Administrator's statutory authority to enter a binding contract to sell coal, and the absence of a claim that the failure to deliver the coal constituted a taking of private property. The Court refused to pass upon the validity of the contract itself, *i. e.*, whether the initial contract with the plaintiff was breached. n12

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n12 The plurality's attempt to distinguish *Larson* is puzzling. It notes that while the plaintiff in *Larson* asserted a right to the property pursuant to the very contract it contended the Government official had breached, here Treasure Salvors claims ownership on grounds entirely independent of the contracts. This is a distinction without meaning: it is the State's claim to the property which is significant; the basis for Treasure Salvors' claim is quite beside the point. The relevant comparison is that the federal official in *Larson* was arguably without authority to enter a contract to sell coal that he had already sold just as the State was arguably without authority to enter a contract respecting salvage on lands outside its waters.

----- End Footnotes-----

****3330** *Larson* established that where the officer's actions are limited by statute, actions beyond those limitations are to be considered individual and not sovereign actions. "The officer is not doing the business which the sovereign has empowered him to do . . . His actions are **ultra vires** his authority ***715** and therefore may be made the object of specific relief." 337 U.S., at 689. Similarly, unconstitutional actions by state officers could not be considered the work of the sovereign and were not protected by the shield of sovereign immunity. The *Larson* Court rejected, however, a third proposed category of **official** actions

amenable to suit. n13 It was urged [***1088] upon the Court that if an "officer . . . wrongly takes or holds specific [*716] property to which the plaintiff has title," then his action is illegal and the officer may be sued. The Court found the theory erroneous:

"The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet that requirement. True, it establishes a wrong to the plaintiff. But it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign." *Id.*, at 693.

----- Footnotes -----

n13 The plurality acknowledges that *Larson* clarified the understanding of earlier cases such as *Tindal v. Wesley*, 167 U.S. 204 (1897), and *United States v. Lee*, 106 U.S. 196 (1882). Dicta in both *Tindal* and *Lee* are cited by the Court to suggest that a federal court may adjudicate the validity of a title in order to determine whether the case is a suit against the State. It is precisely this aspect of the cases that *Larson* "clarified." A court may go only so far as to ascertain whether an official has a colorable basis for his action -- to go farther is to, in effect, try the case on the jurisdictional issue and "is equivalent to asserting that suits against the state are permitted by the eleventh amendment if the result is that the state loses." 621 F.2d 1340, 1351 (CA5 1980) (Rubin, J., dissenting).

The inapplicability of *United States v. Lee* was made clear in *Malone v. Bowdoin*, 369 U.S. 643 (1962), a case involving an attempt to eject a Forest Service Officer from land occupied by him solely in his official capacity under a claim of title in the United States. The plaintiffs argued they were the rightful owners of the land. The Court held that the suit was an impermissible action against the United States, and stated:

"While not expressly overruling *United States v. Lee, supra*, the Court in *Larson* limited that decision in such a way as to make it inapplicable to the case before us. Pointing out that at the time of the *Lee* decision there was no remedy by which the plaintiff could have recovered compensation for the taking of his land, the Court interpreted *Lee* as simply 'a specific application of the constitutional exception to the doctrine of sovereign immunity.' 337 U.S. at 696. So construed, the *Lee* case has continuing validity only 'where there is a claim that the holding constitutes an unconstitutional taking of property without just compensation.' *Id.*, at 697." *Id.*, at 647-648.

An *in rem* admiralty action, like an ejectment suit, is an action to determine title to property, and, here, like in *Bowdoin*, there is no claim of an unconstitutional taking without adequate compensation. Indeed, Treasure Salvors may be able to bring an *in personam* action in state court to determine ownership of the treasure.

----- End Footnotes -----

This is a *Larson* case. Florida entered into the contract pursuant to an indisputably valid state statute, Fla. Stat. § 267.061(1)(b) (1974), providing title to treasure trove abandoned on state-owned submerged lands. The Court relies heavily, as it must, on the subsequent determination that the wreck of the *Atocha* was in international waters. This, of course, was not settled law at the time the contracts were entered into and executed. Before concluding that the state officials' exercise of rights under the contracts was **ultra vires**, it is necessary to reach the merits of the contract, and dispose of the mistake-of-law contention. Similarly, the scattershot reasoning of the District Court in refusing to honor the contract -- characterization of the mistake as one of fact, treatment of the contract as void for coercion

and lack of **[**3331]** consideration -- constitutes an adjudication of the merits of the contracts. *At the time the contracts were entered into and executed they were not **ultra vires** or otherwise so plainly invalid as not to offer a colorable basis for possession of the artifacts.*

It is significant that the analysis pursued by the plurality in this respect is little different from that of the Fifth Circuit in deciding the merits in order to ascertain jurisdiction over the matter. As indicated earlier, the plurality performs the task under a different rubric, but the result is equally objectionable. A colorable basis for the exercise of authority by state officials may not ultimately be a valid one, but it does serve to invoke the Eleventh Amendment. That is the lesson of *Larson* and we should adhere to it.

[*717] [*1089] III**

The plurality begins by stating that "[stripped] of its procedural complexities and factual glamor, this case presents a narrow legal question." *Ante*, at 683. Be that as it may, the answer supplied by the plurality is anything but narrow. If the plurality means all that it says today, the consequences will be unfortunate. Given that all property of the State must be held by its officers, and assuming a jurisdictional basis, there is no item within state possession whose ownership cannot be made the subject of federal litigation by the expedient of arrest or attachment. The State must then defend on the merits: it must persuade a federal court that its officers were justified in holding the controverted property. We see today that this inquiry will be tantamount to deciding the question of title itself. Moreover, the State's immunity from suit is stripped away on land as well as sea: the plurality notes that the question presented would not be any different if the State merely resisted an attachment of property. *Ibid.*

The plurality hardly conceals its view of Florida's claim to the artifacts or the equities involved in this litigation. Yet the Eleventh Amendment teaches that a federal court has no right to offer its opinion on a local dispute between a State and its citizens unless the State consents. In sum, the disposition of this case can only be explained by "procedural complexities and factual glamor." If so, the decision has earned a fitting sobriquet: aberration.

REFERENCES: ♦ [Return To Full Text Opinion](#)

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[32A Am Jur 2d, Federal Practice and Procedure 1681, 1683; 72 Am Jur 2d, States, Territories, and Dependencies 103, 104, 113](#)

1 Federal Procedure, L Ed, Access to District Courts 1:459, 1:461

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L Ed Index to Annos, States

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Annotation References:

Supreme Court's construction of Eleventh Amendment restricting federal judicial power to entertain suits against a state. 50 L Ed 2d 928.

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OPINION OF THE OFFICE OF LEGAL COUNSEL

1992 OLC LEXIS 45; 16 Op. O.L.C. 41

March 4, 1992

CORE TERMS: Fourth Amendment, surveillance, heat, interior, technology, beeper, binoculars, exposure, intimate, reasonable expectation of privacy ...

OPINION:... [***43**] no constitutional violation and no potential liability.

Even if a court were to disagree with our conclusion and hold that FLIR surveillance is a search, we do not believe that DoD personnel would be subject to liability for monetary [***44**] damages. **Federal** officers are entitled to "qualified **immunity**" from tort suits for actions taken in the course of their **official** duties. E.g., Mitchell v. Forsyth, 472 U.S. 511, 528 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982). In Anderson v. Creighton, 483 U.S. 635 (1987), the Supreme Court explained that an officer is entitled to such **immunity** unless he violates a constitutional right that is "clearly established" at the time of the officer's action. The right must be "clearly established" in this particularized sense: "The contours of the right must be sufficiently clear that a reasonable **official** would understand that what he is doing violates that right." Id. at 640.

Given the uncertainty surrounding what expectations of privacy "society is prepared to recognize as reasonable," we do not believe that the use of FLIR from airspace that is used by the general public -- even if ...

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*1984 OLC LEXIS 50, *; 8 Op. O.L.C. 101*

OPINION OF THE OFFICE OF LEGAL COUNSEL

1984 OLC LEXIS 50; 8 Op. O.L.C. 101

May 30, 1984

CORE TERMS: contempt, duty, grand jury, prosecutorial discretion, presidential, subpoena, prosecute, criminal contempt, site, indictment ...

OPINION:

... [*84] impose). The same special attention is provided, of course, to the other two branches when they assert [*85] responsibilities or prerogatives peculiar to their constitutional duties. See, e.g., Gravel v. United States, 408 U.S. 606 (1972) (extending **immunity** of Speech and Debate Clause to congressional assistants); Pierson v. Ray, 386 U.S. 547 (1967) (granting absolute civil **immunity** for judges' **official** actions).

In this case, the congressional contempt statute must be interpreted in light of the specific constitutional problems that would be created if the statute were interpreted to reach an Executive Branch **official** such as the EPA Administrator in the context considered here. n33 As explained more fully below, if executive **officials** were subject to prosecution for criminal contempt whenever they carried out the President's claim of executive privilege, it would significantly burden and immeasurably impair the President's ability to fulfill his constitutional duties. Therefore, the separation of powers principles that underlie the ...

... [*90] a subordinate at the risk of a criminal conviction and possible jail sentence in order for the President to exercise a responsibility that he found necessary to the performance of his constitutional duty. Even if the privilege were upheld, the executive **official** would be put to the risk and burden of a criminal trial in order to vindicate the President's assertion of his constitutional privilege. As Judge Learned Hand stated [*91] with respect to the policy justifications for a prosecutor's **immunity** from civil liability for **official** actions,

to submit all **officials**, the innocent as well as the guilty, 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. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an **official** may later find himself hard put to it to sic satisfy a jury of his good faith.

Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950). The Supreme Court has noted, with respect to the similar issue of executive **immunity** from civil suits, that "among the most persuasive reasons supporting **official immunity** is the prospect that damages liability may render an **official** unduly cautious in the discharge of his **official** duties." Nixon v. Fitzgerald, 457 U.S. 731, 752 n.32 (1982); see also Harlow v. Fitzgerald, 457 U.S. 800 (1982); Butz v. Economou, 438 U.S. 478 (1978). Thus, the courts have recognized that the risk [*92] of civil liability places a pronounced burden on the ability of government **officials** to accomplish their assigned duties, and have restricted such

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liability in a variety of contexts. Id. n35 The even greater threat of criminal liability, simply for obeying a Presidential command to assert the President's constitutionally ...

... [***92**] See United States v. Nixon, 418 U.S. 683 (1974).

n35 See also Barr v. Matteo, 360 U.S. 564 (1959); Spalding v. Vilas, 161 U.S. 483 (1896). Some **officials**, such as judges and prosecutors, have been given absolute **immunity** from civil suits arising out of their **official** acts. Imbler v. Pachtman, 424 U.S. 409 (1976); Pierson v. Ray, 386 U.S. 547 (1967).

By contrast, the congressional interest in applying the criminal contempt sanctions to a ...

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June 2, 1986

The Honorable Sheldon R. Songstad
South Dakota Legislature
Box 47
Sioux Falls, South Dakota 57101

OFFICIAL OPINION NO. 86-19

Immunity of the South Dakota State Fair Commission

Dear Senator Songstad:

You have requested an official opinion from this office concerning whether the South Dakota State Fair Commission created by SDCL ch. 1-21 and the individuals comprising the Commission are immune from suit in South Dakota pursuant to the doctrine of sovereign immunity.

The South Dakota Legislature has enacted SDCL 21-23-15 through 17 conclusive. Those statutes provide:

21-32-15. The state of South Dakota, through the commissioner of administration, may obtain and pay for public liability insurance to the extent and for the purposes considered expedient by the commissioner for the purpose of insuring the liability of the state, its officers, agents or employees.

21-32-16. To the extent such liability insurance is purchased pursuant to § 21-32-15 and to the extent coverage is afforded thereunder, the state shall be deemed to have waived the common law doctrine of sovereign immunity and consented to suit in the same manner that any other party may be sued.

21-32-17. Except as provided in § 21-32-16, any employee, officer or agent of the state, while acting within the scope of his employment or agency, whether such acts are ministerial or discretionary, is immune from suit or liability damages brought against him in either his individual or official capacity.

In 1985, the Governor of South Dakota requested an advisory opinion of the South Dakota Supreme Court relative to the constitutionality and construction of the statutes set out above. Specifically, the Court was asked:

Has the Legislature in enacting SDCL 21-32-17 constitutionally extended to executive, legislative, and judicial employees, officers or agents of the state, including members of state boards and commissions, immunity from suit or liability for damages brought or sought against them in either their individual or official capacity for ministerial or discretionary acts committed while acting within the scope of their employment, agency or duties?

In re Request for Opinion #15187, 379 N.W.2d 822, 824 (S.D. 1985).

In responding to that question, the Supreme Court reviewed the judicial history of sovereign immunity in South Dakota. Following this review the Court stated:

The legislature has now spoken on the subject [sovereign immunity]; our prior 'judge-made' law has been overruled and SDCL 21-32-17 now defines the scope of sovereign immunity.

Id. at 825. The Court went on to hold:

Immunity under SDCL 21-32-17 is granted to members of State Boards and Commissions to the extent that they are employees, officers or agents of the state. Id. at 826.

Accordingly, since by virtue of SDCL 1-21-1 the State Fair Commission is clearly an agency of the State created by the Legislature, it falls squarely within the terms of SDCL 21-32-17 and its immunity or the immunity of its individual members is defined by that statute.

Some concern has been expressed regarding whether the provisions of SDCL 1-21-7 could be construed as a waiver of immunity for the State Fair Commissioners. This statute provides:

The state fair commission as such shall have the power of a body corporate to sue and be sued, to contract and be contracted with; to purchase, hold, and sell property; and to erect buildings in connection with the state fair.

In the first place, the statute set out above addresses itself solely to 'the State Fair Commission as such' when it functions as 'a body corporate.' At the very most, that language allows actions based on contract with the State Fair Commission, as opposed to individual commissioners, to proceed in court.

Second, the South Dakota Supreme Court has on two occasions addressed the effect of similar language and concluded that the 'sue and be sued' clause does not constitute a waiver of sovereign immunity from tort liability. In Guillaume by Guillaume v. Staum, 328 N.W.2d 259 (S.D. 1982), relating to school districts in South Dakota the Court held:

In the absence of statute waiving sovereign immunity from tort liability, statute authorizing a school district to sue and be sued did not create a cause of action in tort. SDCL 13-5-1.

Id. at 260. Almost identical language is found in SDCL 13-49-11 relating to the State Board of Regents regarding which the Supreme Court held:

Statute permitting board of regents to 'sue and be sued' did not, in the absence of statutory authority expressly waiving sovereign immunity, create cause of action in tort against . . . board. SDCL 13-49-11.

Kringen v. Shea, 333 N.W.2d 445, 446 (S.D. 1983). There is no distinction between the sue and be sued language as addressed to school districts or the Board of Regents and there should be no basis for a different construction of this language in the State Fair Commission setting.

Third, in the event the argument is raised that in some manner the state is acting in a proprietary function in the operation of the South Dakota State Fair through the State Fair Commission, it appears that prior holdings of the South Dakota Supreme Court have foreclosed that possibility as well. In High Grade Oil Company v. Sommer, 295 N.W.2d 736 (S.D. 1980), the Supreme Court noted:

This court has recognized the rule that as to the state there is no distinction between governmental and proprietary functions.

295 N.W.2d 738 citing State v. Board of Commissioners, 53 S.D. 609, 632- 633, 222 N.W. 583, 593 (1928). Since our Court has previously held that the State itself, as opposed to local subdivisions of government, always acts in a governmental as opposed to a proprietary function, there simply are no openings in the wall of sovereign immunity surrounding the State, its officers, and employees.

There is of course one major exception to this entire doctrine. As noted by the South Dakota Supreme Court in its most recent opinion on the matter:

This immunity, however, does not protect individuals from liability for actions under 42 U.S.C. § 1983 or other federal statutes that protect federally guaranteed rights.

(Citations omitted.) In re Request for Opinion, 379 N.W.2d 822, 825 (S.D. 1985). Except for the exception noted above and a further exception premised upon acts of employees or agencies outside the boundaries of the State of South Dakota, my answer to your question is that the State Fair Commission, its commissioners, officers, and employees are immune from suit in any case in which sovereign immunity is raised as a defense.

Respectfully submitted,

Mark V. Meierhenry
Attorney General

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Could Plame sue Rove?

By [Anthony J. Sebok](#)
[FindLaw](#) columnist
Special to CNN.com

(FindLaw) -- In 1998, President Bill Clinton was almost forced from office because he lied about whether he had "sexual relations" with Monica Lewinsky in a deposition. The deposition was conducted by lawyers for Paula Jones -- who had sued the president under federal civil rights law and Arkansas tort law.

One of the greatest features of the American civil justice system -- especially its tort law -- is that it gives average citizens the power to force anyone to answer them in court. Could Valerie Plame, the CIA agent whose identity was leaked to the press, take matters into her own hands and use the civil justice system to get Karl Rove -- who may, it seems, have been the leaker -- to answer her in court?

In offering possible answers to this question, I need to also offer a caveat: Media reports on this case may be incomplete and are, in some cases, based on second-hand information and leaks. The facts may turn out to be very different once more is known.

However, as I will discuss in my next column, the holes in the public record may themselves motivate Plame to sue: A civil suit can be an excellent way to force information into the open.

This column explores whether Plame can start that process.

Rove and immunity

A hypothetical case by Plame against Rove would have a number of difficulties, some of which may be fatal to her claim.

The first and most important problem that Plame would have, is that Rove could claim that he is immune from suit because he was a federal employee working for the president when he allegedly injured Plame.

One classic case which deals with the immunity of a federal officer from civil suit -- and that comes close to the Rove/Plame situation -- is the Supreme Court's 1959 decision in [Barr v. Matteo](#) .

There, William G. Barr, Acting Director of Rent Stabilization for the United States, suspended two high-level employees whom he accused of misconduct, and he announced this in a press release. The two employees, John J. Madigan and Linda Matteo, sued Barr in the District of Columbia for defamation, alleging that not only had Barr defamed them, but he did so with malice.

The Supreme Court held that Barr was immune. It reasoned that a federal officer "should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties."

Otherwise, the Court feared the onslaught of "suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous and effective administration of policies of government."

In Barr's case, the Court held that the issuance of a press release was within the "outer perimeters" of his official duties



U.S. Supreme Court

BARR v. MATTEO, 355 U.S. 171 (1957)

355 U.S. 171

BARR v. MATTEO ET AL.

**CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT. No. 409.**

Decided December 9, 1957.

The petition for certiorari in this case presents the question of absolute immunity of government officials from defamation suits. A narrower question, the defense of qualified privilege, had been urged in the District Court and the Court of Appeals, but not considered by the Court of Appeals on the ground that it had been waived. Held: Certiorari is granted, the judgment of the Court of Appeals is vacated, and the case is remanded to that court with directions to consider the defense of qualified privilege. Pp. 171-173.

244 F.2d 767, judgment vacated and case remanded.

Solicitor General Rankin, Assistant Attorney General Doub, Paul A. Sweeney and Bernard Cedarbaum for petitioner.

PER CURIAM.

The petition for certiorari is granted. The petition presents this question: "Whether the absolute immunity from defamation suits accorded officials of the Government with respect to acts done within the scope of their official authority, extends to statements to the press by high policy-making officers, below cabinet or comparable rank, concerning matters committed by law to their control or supervision."

In the District Court and the Court of Appeals the litigation was not so confined. By his motion for a directed verdict and requested instructions petitioner also presented to the District Court the defense of qualified privilege. On appeal to the Court of Appeals petitioner, in his brief, raised only the question of absolute immunity, but on reconsideration he urged the court also [355 U.S. 171, 172] to pass on the defense of qualified privilege. This that court refused to do on the ground that petitioner, because of the position he had initially taken on the appeal, had waived the defense. In so holding, the court relied on its Rule 17 (c) (7), requiring an appellant to set forth in his brief a statement of the points on which he intends to rely, and Rule 17 (i), which provides that "Points not presented according to the rules of the court, will be disregarded, though the court, at its option, may notice and pass upon a plain error not pointed out or relied upon." 244 F.2d 767.

The scope of the litigation in the Court of Appeals cannot lessen this Court's duty to confine itself to the proper exercise of its jurisdiction and the appropriate scope of judicial review. Thus, an advisory opinion cannot be extracted from a federal court by agreement of the parties, see *Swift & Co. v.*

Hocking Valley R. Co., 243 U.S. 281, 289, and no matter how much they may favor the settlement of an important question of constitutional law, broad considerations of the appropriate exercise of judicial power prevent such determinations unless actually compelled by the litigation before the Court. *United States v. C. I. O.*, 335 U.S. 106, 110. Likewise, "Courts should avoid passing on questions of public law even short of constitutionality that are not immediately pressing. Many of the same reasons are present which impel them to abstain from adjudicating constitutional claims against a statute before it effectively and presently impinges on such claims." *Eccles v. Peoples Bank*, 333 U.S. 426, 432. Especially in a case involving on the one hand protection of the reputation of individuals, and on the other the interest of the public in the fullest freedom of officials to make disclosures on matters within the scope of their public duties, this Court should avoid rendering a decision beyond the obvious requirements of the record. In the present case a ground [355 U.S. 171, 173] far narrower than that on which the Court of Appeals rested its decision, the defense of qualified privilege, was consistently pressed in the District Court and in fact urged in the Court of Appeals itself. In these circumstances we think that the broad requirements of judicial power and its proper exercise should lead to consideration of the defense of qualified privilege.

To that end, the judgment of the Court of Appeals is vacated, and the case remanded to that Court with directions to pass upon petitioner's claim of a qualified privilege.

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE joins, agrees with the disposition of this case as expressed in the last paragraph.

MR. JUSTICE BRENNAN would grant the petition and consider the question presented.

MR. JUSTICE DOUGLAS, dissenting.

The Court of Appeals ruled that the question of the defense of qualified privilege on which we vacate and remand had been "waived" by petitioner and therefore should not be considered by the Court of Appeals under its Rules. That question therefore is not here for us nor should it be reached by the Court of Appeals. I cannot say that the Court of Appeals misconstrued its own Rules * or committed palpable error in refusing to consider [355 U.S. 171, 174] the question or unceremoniously and improperly reached for a constitutional question which it should have sought to avoid. Under these circumstances it is an unwarranted exercise of our supervisory powers to require that the question be considered by the Court of Appeals. Instead, we should exercise our discretion by denying certiorari.

[Footnote *] "A concise statement of the points on which appellant intends to rely, set forth in separate, numbered paragraphs. Each point shall refer to the alleged error upon which appellant intends to rely." Rule 17 (c) (7).

"Points not presented according to the rules of the court, will be disregarded, though the court, at its option, may notice and pass upon a plain error not pointed out or relied upon." Rule 17 (i). [355 U.S. 171, 175]

and within the scope of his immunity, since as acting director of an executive office, his job required that information be issued to the public through the media. The Court also held that the allegations that there was a malicious motive behind the press release and that it was false, did not compromise the immunity Barr enjoyed.

Does the Barr ruling mean that Rove cannot be sued? I am not so sure.

The Supreme Court has not granted total personal immunity to federal officers exercising their official capacities. And in 1978, in *Butz et. al. v. Economou et. al* [@](#), the Court distinguished Barr from cases where an official is alleged to have violated someone's constitutional rights.

The question presented in Butz was whether the Secretary of Agriculture and lawyers in the Department of Agriculture had deprived some businessmen of their property without due process. The businessmen claimed that after they publicly criticized the department, the department – in retaliation – initiated a series of groundless administrative investigations against them.

The Butz Court noted that state officials enjoyed only qualified immunity for knowing violations of their citizens' constitutional rights, and that it would be incongruous to grant federal officials greater immunity.

The Court emphasized, however, that the immunity for federal officers would be lifted only when two conditions were met. First, the federal officer had to "know" he or she was violating someone's rights. Second, the right in question had to be based on a law (such as the Constitution) that directly controlled the federal officer's powers.

Applying immunity doctrines

If we apply the holdings of both Barr and Butz to the hypothetical Rove/Plame case, what can we conclude?

Recall, from Barr, that the justification for any sort of immunity for federal officers is that they should be able to pursue the public good without the distractions of litigation. Does this justification apply in Rove's case?

Rove was not running an agency when the leak occurred, in 2003. He did not even have the title he has now, of Deputy Chief of Staff. Still, in the 1981 case of *Harlow v. Fitzgerald* [@](#), the Court held that qualified immunity was available to presidential advisers.

In that case, Harlow, who was "counselor" to President Nixon, was accused of conspiring to violate the constitutional and statutory rights of A. Ernest Fitzgerald by getting him fired. The Court held that advising the president about who should be fired was unquestionably within an advisor's official capacity.

However, Harlow also endorsed the "functional" approach to immunity law, prescribing that immunity extend "no further than its justification would warrant." Does the justification for advisor's immunity cover Rove – who was not providing advice to the president when (and if) he apparently spoke to the press about Plame?

Also, does Plame's claim have to hang on a knowing violation by Rove of her constitutional rights in order for her to have a claim? An intriguing line from Harlow suggests otherwise. There, the Court stated that a presidential aide could be sued personally for civil damages insofar as his or her conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known."

One point seems very clear: If Plame wants to sue Rove personally (rather than in his official capacity), it seems that she will have to craft her claim so that she alleges a constitutional (rather than a common law) tort.

Immunity exempt

Typically, a constitutional tort would involve a deprivation of property, life or liberty without due process of law – or it could involve an interference with another protected right, such as freedom of speech.

Based on the few publicly available details about Plame's life since her identity as an undercover CIA agent was revealed, it is not clear whether she could identify an injury which would fit easily into one of these categories.

Rove is alleged by some to have violated certain federal laws – as FindLaw columnist John Dean discussed in [a column](#)

this month ☞. Could Plame argue that Rove's immunity does not extend to injuries caused by his knowing violation of federal laws prohibiting the unmasking of covert agents?

The advantage of this approach is that Plame would not necessarily have to limit her suit to a claim based on a constitutional injury. Instead, she could argue, for example, that the violation of the federal laws protecting her identity as a covert agent gives her an implied private right of action to sue for damages resulting from Rove's violation of a federal law designed to protect her. (An "implied private right of action" is a civil claim that is inferred from – but not expressly created by – a given statute.)

Plame's best chance would be to argue that Rove's actions were not taken within even the "outer perimeters" of his official duties, but beyond those perimeters. Could she prove that? It is difficult to say, given the limited facts publicly available and the murkiness of this area of law.

Given that Rove's job seems to be nothing other than to promote the political power of the president, one could easily imagine him arguing that defending the president – even by attacking others – is part of his "official job."

Second-best option

Let's suppose that on both of the issues I've discussed above, Rove prevails: He convinces a court that his actions were taken within his official capacity, and Plame cannot characterize her injury as a constitutional tort or base it on an implied right of action. If so, Plame's next best option would be to sue the federal government under the Federal Tort Claims Act (FTCA).

Under the FTCA, the United States government waives its sovereign immunity and consents to be sued for the torts of its employees. Because the federal government is large and solvent, many plaintiffs would rather sue under the FTCA, than try to sue the individual government employee who injured them.

In the Rove case, in contrast, Plame might prefer to sue Rove personally – for reasons I will explain in my next column. Yet even a suit against the government might suit Plame's purposes, since she would still be able to pursue discovery and force Rove to sit for depositions.

The FTCA has its own limitations, of course. It permits torts based in negligence, but not most intentional torts. For example, if Rove had accidentally driven his government-owned limousine into Plame's car while on official business, she could have sued the government under the FTCA. But if Rove had maliciously driven the car into her car, she could not sue under the FTCA for battery – which is an intentional tort. In addition, the FTCA does not waive the government's immunity with regard to suits for defamation.

Key questions

So once again, the question of whether Plame could sue comes down to what injuries she has suffered and how she would frame her tort claims – even though, in this context, her claims would be based on the common law, not on the Constitution.

Interestingly, the claims that Plame would most likely be able to allege -- public disclosure of private facts and intentional infliction of emotional distress -- are allowed under the FTCA.

However, even if Plame were permitted to sue the government for Rove's actions under the FTCA, that would not be the end of the story. The underlying common law tort claims that Plame would bring would still have to be good enough to survive a motion to dismiss, if her goal of starting discovery were to be achieved. (A motion to dismiss asks the court to dismiss an action based on legal – not factual – claims; hence, judges often stay discovery while they are considering a motion to dismiss.)

In my next column, I will examine the common law tort claims Plame could bring if she did indeed initiate a FTCA suit.

I will also discuss whether a suit by Plame -- were she to bring one -- should be compared to Paula Jones's suit against Bill Clinton, and if so, whether that should make Democrats nervous.

Anthony J. Sebok, a [FindLaw](#) ☞ columnist, is a professor at Brooklyn Law School.

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*457 U.S. 800, *; 102 S. Ct. 2727, **;
73 L. Ed. 2d 396, ***; 1982 U.S. LEXIS 139*

HARLOW ET AL. v. FITZGERALD

No. 80-945

SUPREME COURT OF THE UNITED STATES

457 U.S. 800; 102 S. Ct. 2727; 73 L. Ed. 2d 396; 1982 U.S. LEXIS 139

November 30, 1981, Argued
June 24, 1982, Decided

PRIOR HISTORY:

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

DISPOSITION: Vacated and remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioners, Presidential senior aides and advisors, sought review of the judgment of the United States Court of Appeals for the District of Columbia Circuit that denied petitioners' immunity defense in a motion for summary judgment in an action by respondent for civil damages for petitioners' alleged conspiracy to violate respondent's constitutional and statutory rights.

OVERVIEW: Respondent brought an action against petitioners for civil damages for petitioners' alleged conspiracy to violate respondent's constitutional and statutory rights. Respondent averred that petitioners entered into the conspiracy in their capacities as senior presidential aides. Petitioners unsuccessfully asserted an immunity defense. At issue was the scope of the immunity available to senior aides and advisors of the President of the United States in a suit for damages based on their official acts. The court found that petitioners were entitled to some form of immunity from suits for damages. The court held that petitioners were entitled to qualified immunity that would be defeated if they knew or reasonably should have known that the action violated respondent's constitutional rights or if the action was taken with malicious intention to cause a deprivation of respondent's constitutional rights. As such, the judgment denying petitioners' immunity defense was vacated and remanded.

OUTCOME: The court vacated the judgment and remanded the cause, holding that in performing discretionary functions, petitioners were generally shielded from liability for civil damages insofar as their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have had knowledge.

CORE TERMS: aide, absolute immunity, immunity, presidential, summary judgment, qualified immunity, cabinet, senior, duty, egos, insubstantial, lawsuit, discovery, constitutional rights, subjective, staff, performing, prosecutor, discretionary, conspiracy, public policy, literally, civil damages, memorandum, proceed to trial, public interest, derivative, join, derivative immunity, causes of action

LexisNexis(R) Headnotes ♦ [Hide Headnotes](#)[Governments](#) > [Federal Government](#) > [Employees & Officials](#) **HN1**  [5 U.S.C.S. § 7211](#) provides generally that the right of employees to furnish information to either the House of Congress, or to a committee or member thereof, may not be interfered with or denied. [More Like This Headnote](#)[Criminal Law & Procedure](#) > [Criminal Offenses](#) > [Miscellaneous Offenses](#) > [Obstruction of Justice](#) **HN2**  [18 U.S.C.S. § 1505](#) is a criminal statute making it a crime to obstruct congressional testimony. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)[Constitutional Law](#) > [Civil Rights Enforcement](#) > [Immunity](#) > [Public Officials](#) [Governments](#) > [Federal Government](#) > [Employees & Officials](#) [Civil Procedure](#) > [Pleading & Practice](#) > [Defenses, Objections & Demurrers](#) > [Affirmative Defenses](#) **HN3**  Government officials are entitled to some form of immunity from suits for damages. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)[Civil Procedure](#) > [Pleading & Practice](#) > [Defenses, Objections & Demurrers](#) > [Affirmative Defenses](#) **HN4**  For officials whose special functions or constitutional status requires complete protection from suit, the court recognizes the defense of "absolute immunity." Absolute immunity extends to legislators, in their legislative functions, to judges, in their judicial functions, to certain officials of the Executive Branch, including prosecutors and similar officials, to executive officers engaged in adjudicative functions, and to the President of the United States. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)[Constitutional Law](#) > [Civil Rights Enforcement](#) > [Immunity](#) > [Executive Officials](#) [Governments](#) > [Federal Government](#) > [Employees & Officials](#) [Constitutional Law](#) > [The Presidency](#) > [Immunity](#) **HN5**  For executive officials in general, qualified immunity represents the norm. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)[Constitutional Law](#) > [Civil Rights Enforcement](#) > [Immunity](#) > [Executive Officials](#) [Constitutional Law](#) > [The Presidency](#) > [Immunity](#) **HN6**  High officials require greater protection than those with less complex discretionary responsibilities. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)[Constitutional Law](#) > [Civil Rights Enforcement](#) > [Immunity](#) > [Public Officials](#) [Civil Procedure](#) > [Pleading & Practice](#) > [Defenses, Objections & Demurrers](#) > [Affirmative Defenses](#) **HN7**  A governor and his aides can receive the requisite protection from qualified or good-faith immunity. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)[Governments](#) > [Federal Government](#) > [Employees & Officials](#) [Civil Procedure](#) > [Pleading & Practice](#) > [Defenses, Objections & Demurrers](#) > [Affirmative Defenses](#) **HN8**  Judicial, prosecutorial, and legislative functions require absolute immunity. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)[Constitutional Law](#) > [Civil Rights Enforcement](#) > [Immunity](#) > [Public Officials](#) **HN9**  The burden of justifying absolute immunity rests on the official asserting the claim. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)[Constitutional Law](#) > [Civil Rights Enforcement](#) > [Immunity](#) > [Executive Officials](#) 

[Civil Procedure](#) > [Pleading & Practice](#) > [Defenses, Objections & Demurrers](#) > [Affirmative Defenses](#) 

HN10 ↓ In order to establish entitlement to absolute immunity a Presidential aide first must show that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability. He then must demonstrate that he was discharging the protected function when performing the act for which liability is asserted. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN11 ↓ Qualified or "good faith" immunity is an affirmative defense that must be pleaded by a defendant official. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN12 ↓ The "good faith" defense has both an "objective" and a "subjective" aspect. The objective element involves a presumptive knowledge of and respect for basic, unquestioned constitutional rights. The subjective component refers to "permissible intentions." [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN13 ↓ Qualified immunity is defeated if an official knows or reasonably should know that the action he takes within his sphere of official responsibility will violate the constitutional rights of the plaintiff, or if he takes the action with the malicious intention to cause a deprivation of constitutional rights or other injury. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN14 ↓ Fed. R. Civ. P. 56 provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN15 ↓ Fed. R. Civ. P. 56(c) states that summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN16 ↓ In determining whether summary judgment is proper, a court ordinarily must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN17 ↓ Bare allegations of malice will not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN18 Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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SYLLABUS: In respondent's civil damages action in Federal District Court based on his alleged unlawful discharge from employment in the Department of the Air Force, petitioners, White House aides to former President Nixon, were codefendants with him and were claimed to have participated in the same alleged conspiracy to violate respondent's constitutional and statutory rights as was involved in *Nixon v. Fitzgerald*, ante, p. 731. After extensive pretrial discovery, the District Court denied the motions of petitioners and the former President for summary judgment, holding, *inter alia*, that petitioners were not entitled to absolute immunity from suit. Independently of the former President, petitioners appealed the denial of their immunity defense, but the Court of Appeals dismissed the appeal.

Held:

1. Government officials whose special functions or constitutional status requires complete protection from suits for damages -- including certain officials of the Executive Branch, such as prosecutors and similar officials, see *Butz v. Economou*, 438 U.S. 478, and the President, *Nixon v. Fitzgerald*, ante, p. 731 -- are entitled to the defense of absolute immunity. However, executive officials in general are usually entitled to only qualified or good-faith immunity. The recognition of a qualified immunity defense for high executives reflects an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also the need to protect officials who are required to exercise discretion and the related public interest in encouraging the vigorous exercise of official authority. *Scheuer v. Rhodes*, 416 U.S. 232. Federal officials seeking absolute immunity from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope. Pp. 806-808.

2. Public policy does not require a blanket recognition of absolute immunity for Presidential aides. Cf. *Butz*, supra. Pp. 808-813.

(a) The rationale of *Gravel v. United States*, 408 U.S. 606 -- which held the Speech and Debate Clause derivatively applicable to the "legislative acts" of a Senator's aide that would have been privileged if performed by the Senator himself -- does not mandate "derivative" absolute immunity for the President's chief aides. Under the "functional" approach to immunity law, immunity protection extends no further than its justification warrants. Pp. 809-811.

(b) While absolute immunity might be justified for aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, a "special functions" rationale does not warrant a blanket recognition of absolute immunity for all Presidential aides in the performance of all their duties. To establish entitlement to absolute immunity, a Presidential aide first must show that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability. He then must demonstrate that he was discharging the protected function when performing the act for which liability is asserted. Under the record in this case, neither petitioner has made the requisite showing for absolute immunity. However, the possibility that petitioners, on remand, can satisfy the proper standards is not foreclosed. Pp. 811-813.

3. Petitioners are entitled to application of the qualified immunity standard that permits the defeat of insubstantial claims without resort to trial. Pp. 813-820.

(a) The previously recognized "subjective" aspect of qualified or "good faith" immunity -- whereby such immunity is not available if the official asserting the defense "took the action with the malicious intention to cause a deprivation of constitutional rights or other injury," Wood v. Strickland, 420 U.S. 308, 322 -- frequently has proved incompatible with the principle that insubstantial claims should not proceed to trial. Henceforth, government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate "clearly established" statutory or constitutional rights of which a reasonable person would have known. Pp. 815-819.

(b) The case is remanded for the District Court's reconsideration of the question whether respondent's pretrial showings were insufficient to withstand petitioners' motion for summary judgment. Pp. 819-820.

COUNSEL: Elliot L. Richardson argued the cause for petitioners. With him on the briefs was Glenn S. Gerstell.

John E. Nolan, Jr., argued the cause for respondent. With him on the brief were Samuel T. Perkins and Arthur B. Spitzer. *

* Louis Alan Clark filed a brief for the Government Accountability Project of the Institute for Policy Studies as amicus curiae urging affirmance.

Briefs of amici curiae were filed by Solicitor General Lee for the United States; by Roger J. Marzulla and William H. Mellor III for the Mountain States Legal Foundation; by John C. Armor and H. Richard Mayberry for the National Taxpayers Legal Fund, Inc.; and by Thomas J. Madden for Senator Orrin G. Hatch et al.

JUDGES: POWELL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BRENNAN, J., filed a concurring opinion, in which MARSHALL and BLACKMUN, JJ., joined, post, p. 820. BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., filed a separate concurring statement, post, p. 821. REHNQUIST, J., filed a concurring opinion, post, p. 822. BURGER, C. J., filed a dissenting opinion, post, p. 822.

OPINIONBY: POWELL

OPINION: [*802] [***400] [**2729] JUSTICE POWELL delivered the opinion of the Court.

[***LEdHR1A] [1A]^{LEdHR(1A)} The issue in this case is the scope of the immunity available to the senior aides and advisers of the President of the United [**2730] States in a suit for damages based upon their official acts.

I

In this suit for civil damages petitioners Bryce Harlow and Alexander Butterfield are alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the respondent A. Ernest Fitzgerald. Respondent avers that petitioners entered the conspiracy in their capacities as senior White House aides to former President Richard M. Nixon. As the alleged conspiracy is the same as that involved in *Nixon v. Fitzgerald*, ante, p. 731, the facts need not be repeated in detail.

Respondent claims that Harlow joined the conspiracy in his role as the Presidential aide

principally responsible for congressional relations. n1 At the conclusion of discovery the [*803] supporting evidence remained inferential. As evidence of Harlow's conspiratorial activity respondent relies heavily on a series of conversations in which Harlow discussed [***401] Fitzgerald's dismissal with Air Force Secretary Robert Seamans. n2 The other evidence most supportive of Fitzgerald's claims consists of a recorded conversation in which the President later voiced a tentative recollection that Harlow was "all for canning" Fitzgerald. n3

----- Footnotes -----

n1 Harlow held this position from the beginning of the Nixon administration on January 20, 1969, through November 4, 1969. On the latter date he was designated as Counselor to the President, a position accorded Cabinet status. He served in that capacity until December 9, 1970, when he returned to private life. Harlow later resumed the duties of Counselor for the period from July 1, 1973, through April 14, 1974. Respondent appears to allege that Harlow continued in a conspiracy against him throughout the various changes of official assignment.

n2 The record reveals that Secretary Seamans called Harlow in May 1969 to inquire about likely congressional reaction to a draft reorganization plan that would cause Fitzgerald's dismissal. According to Seamans' testimony, "[we] [the Air Force] didn't ask [Harlow] to pass judgment on the action itself. We just asked him what the impact would be in the relationship with the Congress." App. 153a, 164a-165a (deposition of Robert Seamans). Through an aide Harlow responded that "this was a very sensitive item on the Hill and that it would be [his] recommendation that [the Air Force] not proceed to make such a change at that time." *Id.*, at 152a. But the Air Force persisted. Seamans spoke to Harlow on at least one subsequent occasion during the spring of 1969. The record also establishes that Secretary Seamans called Harlow on November 4, 1969, shortly after the public announcement of Fitzgerald's impending dismissal, and again in December 1969. See *id.*, at 186a.

n3 See *id.*, at 284a (transcript of a recorded conversation between Richard Nixon and Ronald Ziegler, February 26, 1973). In a conversation with the President on January 31, 1973, John Ehrlichman also recalled that Harlow had discussed the Fitzgerald case with the President. See *id.*, at 218a-221a (transcript of recorded conversation between Richard Nixon and John Ehrlichman, January 31, 1973). In the same conversation the President himself asserted that he had spoken to Harlow about the Fitzgerald matter, see *id.*, at 218a, but the parties continue to dispute whether Mr. Nixon -- at the most relevant moments in the discussion -- was confusing Fitzgerald's case with that of another dismissed employee. The President explicitly stated at one point that he previously had been confused. See *id.*, at 220a.

----- End Footnotes -----

Disputing Fitzgerald's contentions, Harlow argues that exhaustive discovery has adduced no direct evidence of his involvement [*804] in any wrongful activity. n4 He avers that Secretary Seamans advised him that considerations of efficiency required Fitzgerald's removal by a reduction in force, despite anticipated adverse congressional reaction. Harlow asserts he had no reason to believe that a conspiracy existed. He contends that he took all his actions in good faith. n5

----- Footnotes -----

n4 See Defendants Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment in Civ. No. 74-178 (DC), p. 7 (Feb. 12, 1980).

n5 In support of his version of events Harlow relies particularly on the deposition testimony of Air Force Secretary Seamans, who stated that he regarded abolition of Fitzgerald's position as necessary "to improve the efficiency" of the Financial Management Office of the Air Force and that he never received any White House instruction regarding the Fitzgerald case. App. 159a-160a. Harlow also disputes the probative value of Richard Nixon's recorded remark that Harlow had supported Fitzgerald's firing. Harlow emphasizes the tentativeness of the President's statement. To the President's query whether Harlow was "all for canning [Fitzgerald], wasn't he?", White House Press Secretary Ronald Ziegler in fact gave a negative reply: "No, I think Bryce may have been the other way." *Id.*, at 284a. The President did not respond to Ziegler's comment.

----- End Footnotes-----

[2731]** Petitioner Butterfield also is alleged to have entered the conspiracy not later than May 1969. Employed as Deputy Assistant to the President and Deputy Chief of Staff to H. R. Haldeman, n6 Butterfield circulated a White House memorandum in that month in which he claimed to have learned that Fitzgerald planned to "blow the whistle" on some "shoddy **[***402]** purchasing practices" by exposing these practices to public view. n7 Fitzgerald characterizes this memorandum as evidence **[*805]** that Butterfield had commenced efforts to secure Fitzgerald's retaliatory dismissal. As evidence that Butterfield participated in the conspiracy to conceal his unlawful discharge and prevent his reemployment, Fitzgerald cites communications between Butterfield and Haldeman in December 1969 and January 1970. After the President had promised at a press conference to inquire into Fitzgerald's dismissal, Haldeman solicited Butterfield's recommendations. In a subsequent memorandum emphasizing the importance of "loyalty," Butterfield counseled against offering Fitzgerald another job in the administration at that time. n8

----- Footnotes-----

n6 The record establishes that Butterfield worked from an office immediately adjacent to the oval office. He had almost daily contact with the President until March 1973, when he left the White House to become Administrator of the Federal Aviation Administration.

n7 *Id.*, at 274a. Butterfield reported that this information had been referred to the Federal Bureau of Investigation. In the memorandum Butterfield reported that he had received the information "by word of several mouths, but allegedly from a senior AFL-CIO official originally Evidently, Fitzgerald attended a recent meeting of the National Democratic Coalition and, while there, revealed his intentions to a labor representative who, fortunately for us, was unsympathetic." *Ibid.*

n8 *Id.*, at 99a-100a, 180a-181a. This memorandum, quoted in *Nixon v. Fitzgerald, ante*, at 735-736, was not sent to the Defense Department.

----- End Footnotes-----

For his part, Butterfield denies that he was involved in any decision concerning Fitzgerald's employment status until Haldeman sought his advice in December 1969 -- more than a month after Fitzgerald's termination had been scheduled and announced publicly by the Air Force. Butterfield states that he never communicated his views about Fitzgerald to any official of the Defense Department. He argues generally that nearly eight years of discovery have failed to turn up any evidence that he caused injury to Fitzgerald. n9

----- Footnotes -----

n9 See Memorandum in Support of Summary Judgment, *supra*, at 26. The history of Fitzgerald's litigation is recounted in *Nixon v. Fitzgerald*, *ante*, p. 731. Butterfield was named as a defendant in the initial civil action filed by Fitzgerald in 1974. Harlow was named for the first time in respondent's second amended complaint of July 5, 1978.

----- End Footnotes-----

Together with their codefendant Richard Nixon, petitioners Harlow and Butterfield moved for summary judgment on February 12, 1980. In denying the motion the District Court upheld the legal sufficiency of Fitzgerald's *Bivens* (*Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)) claim under the First Amendment and his "inferred" statutory causes of action under 5 U. S. C. § 7211 (1976 ed., Supp. IV) and 18 U. S. C. § 1505. n10 The court **[*806]** found that **[*2732]** genuine issues of disputed fact remained for resolution at trial. It also ruled that petitioners were not entitled to absolute immunity. App. to Pet. for Cert. 1a-3a.

----- Footnotes -----

n10 The first of these statutes, 5 U. S. C. § 7211 (1976 ed., Supp. IV), ^{HN1} provides generally that "[the] right of employees . . . to . . . furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, ^{HN2} is a criminal statute making it a crime to obstruct congressional testimony. Neither expressly creates a private right to sue for damages. Petitioners argue that the District Court erred in finding that a private cause of action could be inferred under either statute, and that "special factors" present in the context of the federal employer-employee relationship preclude the recognition of respondent's *Bivens* action under the First Amendment. The legal sufficiency of respondent's asserted causes of action is not, however, a question that we view as properly presented for our decision in the present posture of this case. See n. 36, *infra*.

----- End Footnotes-----

Independently **[*403]** of former President Nixon, petitioners invoked the collateral order doctrine and appealed the denial of their immunity defense to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed the appeal without opinion. *Id.*, at 11a-12a. Never having determined the immunity available to the senior aides and advisers of the President of the United States, we granted certiorari. 452 U.S. 959 (1981). n11

----- Footnotes -----

n11 As in *Nixon v. Fitzgerald*, *ante*, p. 731, our jurisdiction has been challenged on the basis that the District Court's order denying petitioners' claim of absolute immunity was not an

appealable final order and that the Court of Appeals' dismissal of petitioners' appeal establishes that this case was never "in" the Court of Appeals within the meaning of 28 U. S. C. § 1254. As the discussion in *Nixon* establishes our jurisdiction in this case as well, we need not consider those challenges in this opinion.

----- End Footnotes-----

II

As we reiterated today in *Nixon v. Fitzgerald*, ante, p. 731, our decisions consistently have held that ^{HN3} government officials are entitled to some form of immunity from suits for damages. As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability.

[*807] Our decisions have recognized immunity defenses of two kinds. ^{HN4} For officials whose special functions or constitutional status requires complete protection from suit, we have recognized the defense of "absolute immunity." The absolute immunity of legislators, in their legislative functions, see, e. g., *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975), and of judges, in their judicial functions, see, e. g., *Stump v. Sparkman*, 435 U.S. 349 (1978), now is well settled. Our decisions also have extended absolute immunity to certain officials of the Executive Branch. These include prosecutors and similar officials, see *Butz v. Economou*, 438 U.S. 478, 508-512 (1978), executive officers engaged in adjudicative functions, *id.*, at 513-517, and the President of the United States, see *Nixon v. Fitzgerald*, ante, p. 731.

^{HN5} For executive officials in general, however, our cases make plain that qualified immunity represents the norm. In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), we acknowledged that ^{HN6} high officials require greater protection than those with less complex discretionary responsibilities. Nonetheless, we held that ^{HN7} a governor and his aides could receive the requisite protection from qualified or good-faith immunity. *Id.*, at 247-248. In *Butz v. Economou*, supra, we extended the approach of *Scheuer* to high federal officials of the Executive Branch. Discussing in detail the considerations that also had underlain our decision in *Scheuer*, we explained that the recognition of a qualified immunity defense for high executives reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, 438 U.S., at 504-505, but also "the need to protect *****404** officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Id.*, at 506. Without discounting the adverse consequences of denying high officials an absolute immunity from private lawsuits alleging constitutional violations -- consequences found sufficient in *Spalding v. Vilas*, 161 U.S. 483 (1896), and *Barr v. Matteo*, 360 U.S. 564 **[*808]** (1959), to warrant extension to such officials of absolute immunity from suits at common *****2733** law -- we emphasized our expectation that insubstantial suits need not proceed to trial:

"Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief . . . , it should not survive a motion to dismiss. Moreover, the Court recognized in *Scheuer* that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. . . . In responding to such a motion, plaintiffs may not play dog in the manger; and 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 (citations omitted).

[***LEdHR2] [2]LEdHR(2)¶ Butz continued to acknowledge that the special functions of some officials might require absolute immunity. But the Court held that "federal 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." *Id.*, at 506. This we reaffirmed today in *Nixon v. Fitzgerald, ante*, at 747.

III

A

[***LEdHR1B] [1B]LEdHR(1B)¶ Petitioners argue that they are entitled to a blanket protection of absolute immunity as an incident of their offices as Presidential aides. In deciding this claim we do not write on an empty page. In *Butz v. Economou, supra*, the Secretary of Agriculture -- a Cabinet official directly accountable to the President -- asserted a defense of absolute official immunity from suit for civil damages. We rejected his claim. In so doing we did not question the power or the importance of the Secretary's office. Nor did we doubt the importance to the [*809] President of loyal and efficient subordinates in executing his duties of office. Yet we found these factors, alone, to be insufficient to justify absolute immunity. "[The] greater power of [high] officials," we reasoned, "affords a greater potential for a regime of lawless conduct." 438 U.S., at 506. Damages actions against high officials were therefore "an important means of vindicating constitutional guarantees." *Ibid.* Moreover, we concluded that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under [42 U. S. C.] § 1983 and suits brought directly under the Constitution against federal officials." *Id.*, at 504.

Having decided in *Butz* that Members [***405] of the Cabinet ordinarily enjoy only qualified immunity from suit, we conclude today that it would be equally untenable to hold absolute immunity an incident of the office of every Presidential subordinate based in the White House. Members of the Cabinet are direct subordinates of the President, frequently with greater responsibilities, both to the President and to the Nation, than White House staff. The considerations that supported our decision in *Butz* apply with equal force to this case. It is no disparagement of the offices held by petitioners to hold that Presidential aides, like Members of the Cabinet, generally are entitled only to a qualified immunity.

B

In disputing the controlling authority of *Butz*, petitioners rely on the principles developed in *Gravel v. United States*, 408 U.S. 606 (1972). n12 In *Gravel* we endorsed the view [***2734] that "it is literally impossible . . . for Members of Congress to perform [*810] their legislative tasks without the help of aides and assistants" and that "the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos" *Id.*, at 616-617. Having done so, we held the Speech and Debate Clause derivatively applicable to the "legislative acts" of a Senator's aide that would have been privileged if performed by the Senator himself. *Id.*, at 621-622.

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n12 Petitioners also claim support from other cases that have followed *Gravel* in holding that congressional employees are derivatively entitled to the legislative immunity provided to United States Senators and Representatives under the Speech and Debate Clause. See *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Doe v. McMillan*, 412 U.S. 306 (1973).

----- End Footnotes-----

Petitioners contend that the rationale of *Gravel* mandates a similar "derivative" immunity for the chief aides of the President of the United States. Emphasizing that the President must delegate a large measure of authority to execute the duties of his office, they argue that recognition of derivative absolute immunity is made essential by all the considerations that support absolute immunity for the President himself.

[LEdHR3A]** [3A]^{LEdHR(3A)} Petitioners' argument is not without force. Ultimately, however, it sweeps too far. If the President's aides are derivatively immune because they are essential to the functioning of the Presidency, so should the Members of the Cabinet -- Presidential subordinates some of whose essential roles are acknowledged by the Constitution itself n13 -- be absolutely immune. Yet we implicitly rejected such derivative immunity in *Butz*. n14 **[**406]** Moreover, in general our cases have followed a "functional" approach to immunity law. We have recognized **[*811]** that the ^{HNS}judicial, prosecutorial, and legislative functions require absolute immunity. But this protection has extended no further than its justification would warrant. In *Gravel*, for example, we emphasized that Senators and their aides were absolutely immune only when performing "acts legislative in nature," and not when taking other acts even "in their official capacity." 408 U.S., at 625. See *Hutchinson v. Proxmire*, 443 U.S. 111, 125-133 (1979). Our cases involving judges n15 and prosecutors n16 have followed a similar line. The undifferentiated extension of absolute "derivative" immunity to the President's aides therefore could not be reconciled with the "functional" approach that has characterized the immunity decisions of this Court, indeed including *Gravel* itself. n17

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n13 See U.S. Const., Art. II, § 2 ("The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . .").

n14 THE CHIEF JUSTICE, *post*, at 828, argues that senior Presidential aides work "more intimately with the President on a daily basis than does a Cabinet officer," and that *Butz* therefore is not controlling. In recent years, however, such men as Henry Kissinger and James Schlesinger have served in both Presidential advisory and Cabinet positions. Kissinger held both posts simultaneously. In our view it is impossible to generalize about the role of "offices" in an individual President's administration without reference to the functions that particular officeholders are assigned by the President. *Butz v. Economou* cannot be distinguished on this basis.

n15 See, e. g., *Supreme Court of Virginia v. Consumers Union of United States*, 446 U.S. 719, 731-737 (1980); *Stump v. Sparkman*, 435 U.S. 349, 362 (1978).

n16 In *Imbler v. Pachtman*, 424 U.S. 409, 430-431 (1976), this Court reserved the question whether absolute immunity would extend to "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer." Since that time the Courts of Appeals generally have ruled that prosecutors do not enjoy absolute immunity for acts taken in those capacities. See, e. g., *Mancini v. Lester*, 630 F.2d 990, 992 (CA3 1980); *Forsyth v. Kleindienst*, 599 F.2d 1203, 1213-1214 (CA3 1979). This Court at least implicitly has drawn the same distinction in extending absolute immunity to executive officials when they are engaged in quasi-prosecutorial functions. See *Butz v. Economou*, 438 U.S., at 515-517.

[**LEdHR3B] [3B]LEdHR(3B)

n17 Our decision today in *Nixon v. Fitzgerald*, ante, p. 731, in no way abrogates this general rule. As we explained in that opinion, the recognition of absolute immunity for all of a President's acts in office derives in principal part from factors unique to his constitutional responsibilities and station. Suits against other officials -- including Presidential aides -- generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself.

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[**2735] C

[**LEdHR1C] [1C]LEdHR(1C) Petitioners also assert an entitlement to immunity based on the "special functions" of White House aides. This form [*812] of argument accords with the analytical approach of our cases. For aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest. n18 But a "special functions" rationale does not warrant a blanket recognition of absolute immunity for all Presidential aides in the performance of all their duties. This conclusion too follows from our decision in *Butz*, which establishes that an executive official's claim to absolute immunity must be justified by reference [***407] to the public interest in the special functions of his office, not the mere fact of high station. n19

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207

n18 Cf. *United States v. Nixon*, 418 U.S. 683, 710-711 (1974) ("[Courts] have traditionally shown the utmost deference to Presidential responsibilities" for foreign policy and military affairs, and claims of privilege in this area would receive a higher degree of deference than invocations of "a President's generalized interest in confidentiality"); *Katz v. United States*, 389 U.S. 347, 364 (1967) (WHITE, J., concurring) ("We 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") (emphasis added).

n19 *Gravel v. United States*, 408 U.S. 606 (1972), points to a similar conclusion. We fairly may assume that some aides are assigned to act as Presidential "alter egos," *id.*, at 616-617, in the exercise of functions for which absolute immunity is "essential for the conduct of the public business," *Butz, supra*, at 507. Cf. *Gravel, supra*, at 620 (derivative immunity extends only to acts within the "central role" of the Speech and Debate Clause in permitting free legislative speech and debate). By analogy to *Gravel*, a derivative claim to Presidential immunity would be strongest in such "central" Presidential domains as foreign policy and national security, in which the President could not discharge his singularly vital mandate without delegating functions nearly as sensitive as his own.

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[LEdHR4]** [4]^{LEdHR(4)} Butz also identifies the location of the burden of proof. ^{HN9} The burden of justifying absolute immunity rests on the official asserting the claim. 438 U.S., at 506. We have not of course had occasion to identify how a Presidential aide might carry this burden. But the general requisites are familiar in our cases. ^{HN10} In order to establish entitlement to absolute immunity **[*813]** a Presidential aide first must show that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability. n20 He then must demonstrate that he was discharging the protected function when performing the act for which liability is asserted. n21

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n20 Here as elsewhere the relevant judicial inquiries would encompass considerations of public policy, the importance of which should be confirmed either by reference to the common law or, more likely, our constitutional heritage and structure. See *Nixon v. Fitzgerald, ante*, at 747-748.

n21 The need for such an inquiry is implicit in *Butz v. Economou, supra*, at 508-517; see *Imbler v. Pachtman, supra*, at 430-431. Cases involving immunity under the Speech and Debate Clause have inquired explicitly into whether particular acts and activities qualified for the protection of the Clause. See, e. g., *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Doe v. McMillan*, 412 U.S. 306 (1973); *Gravel v. United States, supra*.

----- End Footnotes -----

Applying these standards to the claims advanced by petitioners Harlow and Butterfield, we cannot conclude on the record before us that either has shown that "public policy requires [for any of the functions of his office] an exemption of [absolute] scope." *Butz*, 438 U.S., at 506. Nor, assuming that petitioners did have functions for which absolute immunity would be warranted, could **[**2736]** we now conclude that the acts charged in this lawsuit -- if taken at all -- would lie within the protected area. We do not, however, foreclose the possibility that petitioners, on remand, could satisfy the standards properly applicable to their claims.

IV

[LEdHR1D]** [1D]^{LEdHR(1D)} Even if they cannot establish that their official functions require absolute immunity, petitioners assert that public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial. We agree.

A

The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative. **[*814]** In situations of abuse of office, an action for damages may offer the only realistic avenue **[**408]** for vindication of constitutional guarantees. *Butz v. Economou, supra*, at 506; see *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S., at 410 ("For people in Bivens' shoes, it is damages or nothing"). It is this recognition that has required the denial of absolute immunity to most public officers. At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty -- at a cost not only to the defendant officials, but to society as a whole. n22 These social costs include the expenses of litigation, the diversion of official

energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177 F.2d 579, 581 (CA2 1949), cert. denied, 339 U.S. 949 (1950).

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n22 See generally Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 S. Ct. Rev. 281, 324-327.

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In identifying qualified immunity as the best attainable accommodation of competing values, in *Butz, supra*, at 507-508, as in *Scheuer*, 416 U.S., at 245-248, we relied on the assumption that this standard would permit "[insubstantial] lawsuits [to] be quickly terminated." 438 U.S., at 507-508; see *Hanrahan v. Hampton*, 446 U.S. 754, 765 (1980) (POWELL, J., concurring in part and dissenting in part). n23 Yet petitioners advance persuasive arguments that the dismissal of insubstantial lawsuits without trial -- a factor presupposed in the balance of competing interests struck by [*815] our prior cases -- requires an adjustment of the "good faith" standard established by our decisions.

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n23 The importance of this consideration hardly needs emphasis. This Court has noted the risk imposed upon political officials who must defend their actions and motives before a jury. See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 405 (1979); *Tenney v. Brandhove*, 341 U.S. 367, 377-378 (1951). As the Court observed in *Tenney*: "In times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed." *Id.*, at 378.

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B

***LEdHR5 [5] ^{LEdHR(5)} ^{HN11} Qualified or "good faith" immunity is an affirmative defense that must be pleaded by a defendant official. *Gomez v. Toledo*, 446 U.S. 635 (1980). n24 Decisions of this Court have established that ^{HN12} the "good faith" defense has both an "objective" and a "subjective" aspect. The objective element [*2737] involves a presumptive knowledge of and respect for "basic, unquestioned constitutional rights." *Wood v. Strickland*, 420 U.S. 308, 322 (1975). The subjective component refers to "permissible intentions." *Ibid.* Characteristically [*409] the Court has defined these elements by identifying the circumstances in which qualified immunity would *not* be available. Referring both to the objective and subjective elements, we have held that ^{HN13} qualified immunity would be defeated if an official "*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury" *Ibid.* (emphasis added). n25

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n24 Although *Gomez* presented the question in the context of an action under 42 U. S. C. § 1983, the Court's analysis indicates that "immunity" must also be pleaded as a defense in actions under the Constitution and laws of the United States. See 446 U.S., at 640. *Gomez* did not decide which party bore the burden of proof on the issue of good faith. *Id.*, at 642 (REHNQUIST, J., concurring).

n25 In *Wood* the Court explicitly limited its holding to the circumstances in which a school board member, "in the specific context of school discipline," 420 U.S., at 322, would be stripped of claimed immunity in an action under § 1983. Subsequent cases, however, have quoted the *Wood* formulation as a general statement of the qualified immunity standard. See, e. g., *Procurier v. Navarette*, 434 U.S. 555, 562-563, 566 (1978), quoted in *Baker v. McCollan*, 443 U.S. 137, 139 (1979).

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*****LEdHR6A** [6A]^{LEdHR(6A)} The subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz* [*816] that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure^{HN14} provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. n26 And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury. n27

*****LEdHR6B** [6B]^{LEdHR(6B)}

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n26 Rule 56(c)^{HN15} states that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." ^{HN16} In determining whether summary judgment is proper, a court ordinarily must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party. *E. g.*, *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962).

n27 *E. g.*, *Landrum v. Moats*, 576 F.2d 1320, 1329 (CA8 1978); *Duchesne v. Sugarman*, 566 F.2d 817, 832-833 (CA2 1977); cf. *Hutchinson v. Proxmire*, 443 U.S., at 120, n. 9 (questioning whether the existence of "actual malice," as an issue of fact, may properly be decided on summary judgment in a suit alleging libel of a public figure).

----- End Footnotes-----

In the context of *Butz*' attempted balancing of competing values, it now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial -- distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind. Immunity generally is available only to officials performing discretionary functions. In contrast with the thought processes accompanying "ministerial" tasks, the judgments

surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment. Yet they also frame a background [*817] in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an [***410] official's professional colleagues. n28 Inquiries of this [**2738] kind can be peculiarly disruptive of effective government. n29

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n28 In suits against a President's closest aides, discovery of this kind frequently could implicate separation-of-powers concerns. As the Court recognized in *United States v. Nixon*, 418 U.S., at 708:

"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."

n29 As Judge Gesell observed in his concurring opinion in *Halperin v. Kissinger*, 196 U. S. App. D. C. 285, 307, 606 F.2d 1192, 1214 (1979), aff'd in pertinent part by an equally divided Court, 452 U.S. 713 (1981):

"We should not close our eyes to the fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials in their personal capacities based on alleged constitutional torts. Each such suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discover [sic] is wide-ranging, time-consuming, and not without considerable cost to the officials involved. It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient [to force a trial]. . . . The effect of this development upon the willingness of individuals to serve their country is obvious."

----- End Footnotes -----

[***LEdHR1E] [1E]LEdHR(1E) Consistently with the balance at which we aimed in *Butz*, we conclude today that HN17 bare allegations of malice should not suffice to subject government officials either to the costs of [*818] trial or to the burdens of broad-reaching discovery. We therefore hold that HN18 government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. See *Procunier v. Navarette*, 434 U.S. 555, 565 (1978); *Wood v.*

Strickland, 420 U.S., at 322. n30

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n30 This case involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under 42 U. S. C. § 1983. We have found previously, however, that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." Butz v. Economou, 438 U.S., at 504.

Our decision in no way diminishes the absolute immunity currently available to officials whose functions have been held to require a protection of this scope.

----- End Footnotes-----

*****LEdHR7** [7]^{LEdHR(7)} *****LEdHR8** [8]^{LEdHR(8)} Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, n31 should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. n32 If the law at *****411** that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily *****819** should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

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n31 This case involves no claim that Congress has expressed its intent to impose "no fault" tort liability on high federal officials for violations of particular statutes or the Constitution.

n32 As in Procunier v. Navarette, 434 U.S., at 565, we need not define here the circumstances under which "the state of the law" should be "evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court."

----- End Footnotes-----

By defining the limits of qualified immunity essentially in objective terms, we provide *****2739** no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. n33 But where an official's duties legitimately require action in which clearly

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established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences." *Pierson v. Ray*, 386 U.S. 547, 554 (1967). n34

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n33 Cf. *Procunier v. Navarette*, *supra*, at 565, quoting *Wood v. Strickland*, 420 U.S., at 322 ("Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for the established law that their conduct 'cannot reasonably be characterized as being in good faith'").

n34 We emphasize that our decision applies only to suits for civil *damages* arising from actions within the scope of an official's duties and in "objective" good faith. We express no view as to the conditions in which injunctive or declaratory relief might be available.

----- End Footnotes-----

C

In this case petitioners have asked us to hold that the respondent's pretrial showings were insufficient to survive their motion for summary judgment. n35 We think it appropriate, **[*820]** however, to remand the case to the District Court for its reconsideration of this issue in light of this opinion. n36 The trial court is more *****412]** familiar with the record so far developed and also is better situated to make any such further findings as may be necessary.

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n35 In *Butz*, we admonished that "insubstantial" suits against high public officials should not be allowed to proceed to trial. 438 U.S., at 507. See *Schuck*, *supra* n. 22, at 324-327. We reiterate this admonition. Insubstantial lawsuits undermine the effectiveness of government as contemplated by our constitutional structure, and "firm application of the Federal Rules of Civil Procedure" is fully warranted in such cases. 438 U.S., at 508.

n36 Petitioners also have urged us, prior to the remand, to rule on the legal sufficiency of respondent's "implied" causes of action under 5 U. S. C. § 7211 (1976 ed., Supp. IV) and 18 U. S. C. § 1505 and his *Bivens* claim under the First Amendment. We do not view petitioners' argument on the statutory question as insubstantial. Cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 377-378 (1982) (controlling question in implication of statutory causes of action is whether Congress affirmatively intended to create a damages remedy); *Middlesex County Sewerage Auth. v. National Sea Clammers Assn.*, 453 U.S. 1 (1981) (same); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638-639 (1981) (same). Nor is the *Bivens* question. Cf. *Bush v. Lucas*, 647 F.2d 573, 576 (CA5 1981) (holding that the "unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a *Bivens* remedy"). As in *Nixon v. Fitzgerald*, *ante*, p. 731, however, we took jurisdiction of the case only to resolve the immunity question under the collateral order doctrine. We therefore think it appropriate to leave these questions for fuller consideration by the District Court and, if necessary, by the Court of Appeals.

- - - - - End Footnotes- - - - -

V

The judgment of the Court of Appeals is vacated, and the case is remanded for further action consistent with this opinion.

So ordered.

CONCURBY: BRENNAN; WHITE; MARSHALL; BLACKMUN; REHNQUIST

CONCUR: JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring.

I agree with the substantive standard announced by the Court today, imposing liability when a public-official defendant [*821] "knew or should have known" of the constitutionally violative effect of his actions. *Ante*, at 815, 819. This standard would not allow the official who *actually knows* that he was violating the law to escape liability for his actions, even if he could not "reasonably have been expected" to know what he actually did know. *Ante*, at 819, [**2740] n. 33. Thus the clever and unusually well-informed violator of constitutional rights will not evade just punishment for his crimes. I also agree that this standard applies "across the board," to all "government officials performing discretionary functions." *Ante*, at 818. I write separately only to note that given this standard, it seems inescapable to me that some measure of discovery may sometimes be required to determine exactly what a public-official defendant did "know" at the time of his actions. In this respect the issue before us is very similar to that addressed in *Herbert v. Lando*, 441 U.S. 153 (1979), in which the Court observed that "[to] erect an impenetrable barrier to the plaintiff's use of such evidence on his side of the case is a matter of some substance, particularly when defendants themselves are prone to assert their [good faith] . . ." *Id.*, at 170. Of course, as the Court has already noted, *ante*, at 818-819, summary judgment will be readily available to public-official defendants whenever the state of the law was so ambiguous at the time of the alleged violation that it could not have been "known" then, and thus liability could not ensue. In my view, summary judgment will also be readily available whenever the plaintiff cannot prove, as a threshold matter, that a violation of his constitutional [***413] rights actually occurred. I see no reason why discovery of defendants' "knowledge" should not be deferred by the trial judge pending decision of any motion of defendants for summary judgment on grounds such as these. Cf. *Herbert v. Lando, supra*, at 180, n. 4 (POWELL, J., concurring).

JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN, concurring.

We join the Court's opinion but, having dissented in *Nixon* [*822] v. *Fitzgerald*, *ante*, p. 731, we disassociate ourselves from any implication in the Court's opinion in the present case that *Nixon v. Fitzgerald* was correctly decided.

JUSTICE REHNQUIST, concurring.

At such time as a majority of the Court is willing to reexamine our holding in *Butz v. Economou*, 438 U.S. 478 (1978), I shall join in that undertaking with alacrity. But until that time comes, I agree that the Court's opinion in this case properly disposes of the issues presented, and I therefore join it.

DISSENTBY: BURGER

DISSENT: CHIEF JUSTICE BURGER, dissenting.

The Court today decides in *Nixon v. Fitzgerald*, ante, p. 731, what has been taken for granted for 190 years, that it is implicit in the Constitution that a President of the United States has absolute immunity from civil suits arising out of official acts as Chief Executive. I agree fully that absolute immunity for official acts of the President is, like executive privilege, "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974). n1

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n1 As I noted in *Nixon v. Fitzgerald*, Presidential immunity for official acts while in office has never been seriously questioned until very recently. See ante, at 758, n. 1 (BURGER, C. J., concurring).

----- End Footnotes-----

In this case the Court decides that senior aides of the President do not have derivative immunity from the President. I am at a loss, however, to reconcile this conclusion with our holding in *Gravel v. United States*, 408 U.S. 606 (1972). The Court reads *Butz v. Economou*, 438 U.S. 478 (1978), as resolving that question; I do not. *Butz* is clearly distinguishable. n2

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n2 If indeed there is an irreconcilable conflict between *Gravel* and *Butz*, the Court has an obligation to try to harmonize its holdings -- or at least tender a reasonable explanation. The Court has done neither.

----- End Footnotes-----

[*823] [2741]** In *Gravel* we held that it is implicit in the Constitution that aides of Members of Congress have absolute immunity for acts performed for Members in relation to their legislative function. We viewed the aides' immunity as deriving from the Speech or Debate Clause, which provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." Art. I, § 6, cl. 1 (emphasis added). Read literally, the Clause would, of course, limit absolute immunity only to the Member and only to speech and debate within the Chamber. But we have read much more into this plain language. The Clause says nothing **[***414]** about "legislative acts" outside the Chambers, but we concluded that the Constitution grants absolute immunity for legislative acts not only "in either House" but in committees and conferences and in reports on legislative activities.

Nor does the Clause mention immunity for congressional aides. Yet, going far beyond any words found in the Constitution itself, we held that a Member's aides who implement policies and decisions of the Member are entitled to the same absolute immunity as a Member. It is hardly an overstatement to say that we thus avoided a "literalistic approach," *Gravel, supra*, at 617, and instead looked to the structure of the Constitution and the evolution of the function of the Legislative Branch. In short, we drew this immunity for legislative aides from a functional analysis of the legislative process in the context of the Constitution taken as a whole and in light of 20th-century realities. Neither Presidents nor Members of Congress can, as they once did, perform all their constitutional duties personally. n3

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n3 A Senator's allotment for staff varies significantly, but can range from as few as 17 to over 70 persons, in addition to committee staff aides who perform important legislative functions for Members. S. Doc. No. 97-19, pp. 27-106 (1981). House Members have roughly 18 to 26 assistants at any one time, in addition to committee staff aides. H. R. Doc. No. 97-113, pp. 28-174 (1981).

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[*824] We very properly recognized in *Gravel* that the central purpose of a Member's absolute immunity would be "diminished and frustrated" if the legislative aides were not also protected by the same broad immunity. Speaking for the Court in *Gravel*, JUSTICE WHITE agreed with the Court of Appeals that

"it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks *without the help of aides* and assistants; that the day-to-day work of such aides *is so critical to the Members' 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 Speech or Debate Clause -- to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary . . . -- will inevitably be diminished and frustrated." 408 U.S., at 616-617 (emphasis added).

I joined in that analysis and continue to agree with it, for without absolute immunity for these "elbow aides," who are indeed "alter egos," a Member could not effectively discharge all of the assigned constitutional functions of a modern legislator.

The Court has made this reality a matter of our constitutional jurisprudence. How can we conceivably hold that a President of the United States, who represents a vastly larger constituency than does any Member of Congress, should not have "alter egos" with comparable immunity? To perform the constitutional duties assigned to the Executive would be "literally impossible, in view of the complexities of the **[***415]** modern [Executive] process, . . . without the help of **[*825]** aides and assistants." n4 *Id.*, at 616. **[**2742]** These words reflect the precise analysis of *Gravel*, and this analysis applies with at least as much force to a President. The primary layer of senior aides of a President -- like a Senator's "alter egos" -- are literally at a President's elbow, with offices a few feet or at most a few hundred feet from his own desk. The President, like a Member of Congress, may see those personal aides many times in one day. They are indeed the President's "arms" and "fingers" to aid in performing his constitutional duty to see "that the laws [are] faithfully executed." Like a Member of Congress, but on a vastly greater scale, the President cannot personally implement a fraction of his own policies and day-to-day decisions. n5

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n4 In the early years of the Republic, Members of Congress and Presidents performed their duties without staffs of aides and assistants. Washington and Jefferson spent much of their time on their plantations. Congress did not even appropriate funds for a Presidential clerk until 1857. Lincoln opened his own mail, Cleveland answered the phone at the White House, and Wilson regularly typed his own speeches. S. Wayne, *The Legislative Presidency* 30 (1978). Whatever may have been the situation beginning under Washington, Adams, and Jefferson, we know today that the Presidency functions with a staff that exercises a wide spectrum of authority and discretion and directly assists the President in carrying out

constitutional duties.

n5 JUSTICE WHITE's dissent in *Nixon v. Fitzgerald* today expresses great concern that a President may "cause serious injury to any number of citizens even though he knows his conduct violates a statute . . ." *Ante*, at 764. What the dissent wholly overlooks, however, is the plain fact that the absolute immunity does not protect a President for acts *outside* the constitutional function of a President.

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For some inexplicable reason the Court declines to recognize the realities in the workings of the Office of a President, despite the Court's cogent recognition in *Gravel* concerning the realities of the workings of 20th-century Members of Congress. Absent equal protection for a President's aides, how will Presidents be free from the risks of "intimidation . . . by [Congress] and accountability before a possibly hostile [*826] judiciary?" *Gravel*, 408 U.S., at 617. Under today's holding in this case the functioning of the Presidency will inevitably be "diminished and frustrated." *Ibid*.

Precisely the same public policy considerations on which the Court now relies in *Nixon v. Fitzgerald*, and that we relied on only recently in *Gravel*, are fully applicable to senior Presidential aides. The Court's opinion in *Nixon v. Fitzgerald* correctly points out that if a President were subject to suit, awareness of personal vulnerability to suit "frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Ante*, at 753. This same negative incentive will permeate the inner workings of the Office of the President if the Chief Executive's "alter egos" are not protected derivatively from the immunity of the President. In addition, exposure to civil liability for official acts will result in constant judicial questioning, through judicial proceedings and pretrial discovery, into the inner workings of the Presidential Office beyond that necessary to maintain [***416] the traditional checks and balances of our constitutional structure. n6

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n6 The same remedies for checks on Presidential abuse also will check abuses by the comparatively small group of senior aides who act as "alter egos" of the President. The aides serve at the pleasure of the President and thus may be removed by the President. Congressional and public scrutiny maintain a constant and pervasive check on abuses, and such aides may be prosecuted criminally. See *Nixon, ante*, at 757. However, a criminal prosecution cannot be commenced absent careful consideration by a grand jury at the request of a prosecutor; the same check is not present with respect to the commencement of civil suits in which advocates are subject to no realistic accountability.

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I challenge the Court and the dissenters in *Nixon v. Fitzgerald* who join in the instant holding to say that the effectiveness of Presidential aides will not "inevitably be diminished and frustrated," *Gravel, supra, at 617*, if they must weigh every act and decision in relation to the risks of future [*827] lawsuits. The *Gravel* Court took note of the burdens on congressional aides: the stress of long [**2743] hours, heavy responsibilities, constant exposure to harassment of the political arena. Is the Court suggesting the stresses are less for Presidential aides? By construing the Constitution to give only qualified immunity to senior Presidential aides we give those key "alter egos" only lawsuits, winnable lawsuits perhaps,

but lawsuits nonetheless, with stress and effort that will disperse and drain their energies and their purses. n7

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n7 The Executive Branch may as a matter of grace supply some legal assistance. The Department of Justice has a longstanding policy of representing federal officers in civil suits involving conduct performed within the scope of their employment. In addition, the Department provides for retention of private legal counsel when necessary. See Senate Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, Justice Department Retention of Private Legal Counsel to Represent Federal Employees in Civil Lawsuits, 95th Cong., 2d Sess. (Comm. Print 1978). The Congress frequently pays the expenses of defending its Members even as to acts wholly outside the legislative function.

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In this Court we witness the new filing of as many as 100 cases a week, many utterly frivolous and even bizarre. Yet the defending party in many of these cases may have spent or become liable for thousands of dollars in litigation expense. Hundreds of thousands of other cases are disposed of without reaching this Court. When we see the myriad irresponsible and frivolous cases regularly filed in American courts, the magnitude of the potential risks attending acceptance of public office emerges. Those potential risks inevitably will be a factor in discouraging able men and women from entering public service.

We -- judges collectively -- have held that the common law provides us with absolute immunity for ourselves with respect to judicial acts, however erroneous or ill-advised. See, e. g., *Stump v. Sparkman*, 435 U.S. 349 (1978). Are the lowest ranking of 27,000 or more judges, thousands of prosecutors, and thousands of congressional aides -- an aggregate [***828**] of not less than 75,000 in all -- entitled to greater protection than two senior aides of a President?

Butz v. Economou, 438 U.S. 478 (1978), does not dictate that senior Presidential aides be given only qualified immunity. *Butz* held only that a Cabinet officer exercising discretion was not entitled to absolute immunity; we need not abandon that holding. [*****417**] A senior Presidential aide works more intimately with the President on a daily basis than does a Cabinet officer, directly implementing Presidential decisions literally from hour to hour.

In his dissent today in *Nixon v. Fitzgerald*, JUSTICE WHITE states that the "Court now applies the dissenting view in *Butz* to the Office of the President." *Ante*, at 764. However, this suggests that a President and his Cabinet officers, who serve only "during the pleasure of the President," are on the same plane constitutionally. It wholly fails to distinguish the role of a President or his "elbow aides" from the role of Cabinet officers, who are department heads rather than "alter egos." It would be in no sense inconsistent to hold that a President's personal aides have greater immunity than Cabinet officers.

The Court's analysis in *Gravel* demonstrates that the question of derivative immunity does not and should not depend on a person's rank or position in the hierarchy, but on the *function* performed by the person and the relationship of that person to the superior. Cabinet officers clearly outrank United States Attorneys, yet qualified immunity is accorded the former and absolute immunity the latter; rank is important only to the extent that the rank determines the function to be performed. The function of senior Presidential aides, as the "alter egos" of the President, is an integral, inseparable part of the function of the President. n8 JUSTICE WHITE [***829**] was clearly [****2744**] correct in *Gravel*, stating that Members of Congress could not "perform their legislative tasks without the help of aides and

assistants; [and] that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos" 408 U.S., at 616-617.

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n8 This Court had no trouble reconciling *Gravel* with *Kilbourn v. Thompson*, 103 U.S. 168 (1881). In *Kilbourn* the Sergeant-at-Arms of the House of Representatives was held not to share the absolute immunity enjoyed by the Members of Congress who ordered that officer to act.

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By ignoring *Gravel* and engaging in a wooden application of *Butz*, the Court significantly undermines the functioning of the Office of the President. Under the Court's opinion in *Nixon* today it is clear that Presidential immunity derives from the Constitution as much as congressional immunity comes from that source. Can there rationally be one rule for congressional aides and another for Presidential aides simply because the initial absolute immunity of each derives from different aspects of the Constitution? I find it inexplicable why the Court makes no effort to demonstrate why the Chief Executive of the Nation should not be assured that senior staff aides will have the same protection as the aides of Members of the House and Senate.

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Annotation References:

Unconstitutional conduct by state or federal officer as affecting governmental immunity from suit in federal court. [12 L Ed 2d 1110.](#)

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U.S. Supreme Court

BUTZ v. ECONOMOU, 438 U.S. 478 (1978)

438 U.S. 478

**BUTZ ET AL. v. ECONOMOU ET AL.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT**

No. 76-709.

Argued November 7, 1977

Decided June 29, 1978

After an unsuccessful Department of Agriculture proceeding to revoke or suspend the registration of respondent's commodity futures commission company, respondent filed an action for damages in District Court against petitioner officials (including the Secretary and Assistant Secretary of Agriculture, the Judicial Officer, the Chief Hearing Examiner who had recommended sustaining the administrative complaint, and the Department attorney who had prosecuted the enforcement proceeding), alleging, inter alia, that by instituting unauthorized proceedings against him they had violated various of his constitutional rights. The District Court dismissed the action on the ground that the individual defendants, as federal officials, were entitled to absolute immunity for all discretionary acts within the scope of their authority. The Court of Appeals reversed, holding that the defendants were entitled only to the qualified immunity available to their counterparts in state government. Held:

1. Neither *Barr v. Matteo*, 360 U.S. 564, nor *Spalding v. Vilas*, 161 U.S. 483, supports petitioners' contention that all of the federal officials sued in this case are absolutely immune from any liability for damages even if in the course of enforcing the relevant statutes they infringed respondent's constitutional rights and even if the violation was knowing and deliberate. Nor did either of those cases purport to abolish the liability of federal officers for actions manifestly beyond their line of duty; if they are accountable when they stray beyond the plain limits of their statutory authority, it would be incongruous to hold that they may nevertheless willfully or knowingly violate constitutional rights without fear of liability. Pp. 485-496.
2. Without congressional directions to the contrary, it would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials under 42 U.S.C. 1983, *Scheuer v. Rhodes*, 416 U.S. 232, and suits brought directly under the Constitution against federal officials, *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388. Federal officials should enjoy no greater zone of protection when they violate federal constitutional rules than do state officers. Pp. 496-504. [438 U.S. 478, 479]
3. In a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer v. Rhodes*, *supra*, subject to those exceptional situations where it is demonstrated that absolute immunity is

essential for the conduct of the public business. While federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law, there is no substantial basis for holding that executive officers generally may with impunity discharge their duties in a way that is known to them to violate the Constitution or in a manner that they should know transgresses a clearly established constitutional rule. Pp. 504-508.

4. 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. Pp. 508-517.

(a) In light of the safeguards provided in agency adjudication to assure that the hearing examiner or administrative law judge exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency, the risk of an unconstitutional act by one presiding at the agency hearing is clearly outweighed by the importance of preserving such independent judgment. Therefore, persons subject to these restraints and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts. Pp. 508-514.

(b) Agency officials who perform functions analogous to those of a prosecutor must make the decision to move forward with an administrative proceeding free from intimidation or harassment. Because the legal remedies already available to the defendant in such a proceeding provide sufficient checks on agency zeal, those officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity from damages liability for their parts in that decision. Pp. 515-516.

(c) There is no substantial difference between the function of an agency attorney in presenting evidence in an agency hearing and the function of the prosecutor who brings evidence before a court, and since administrative agencies can act in the public interest only if they can adjudicate on the basis of a complete record, an agency attorney who arranges for the presentation of evidence on the record in the course of an adjudication is absolutely immune from suits based on the introduction of such evidence. Pp. 516-517.

5. The case is remanded for application of the foregoing principles [438 U.S. 478, 480] to the claims against the particular petitioner-defendants involved. P. 517.

535 F.2d 688, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed an opinion, concurring in part and dissenting in part, in which BURGER, C. J., and STEWART and STEVENS, JJ., joined, post, p. 517.

Deputy Solicitor General Friedman argued the cause for petitioners. With him on the briefs were Solicitor General McCree, Assistant Attorney General Babcock, Robert E. Kopp, and Barbara L. Herwig.

David C. Buxbaum argued the cause and filed a brief for respondents.

MR. JUSTICE WHITE delivered the opinion of the Court.

This case concerns the personal immunity of federal officials in the Executive Branch from claims for

damages arising from their violations of citizens' constitutional rights. Respondent 1 filed suit against a number of officials in the Department of Agriculture claiming that they had instituted an investigation and an administrative proceeding against him in retaliation for his criticism of that agency. The District Court dismissed the action on the ground that the individual defendants, as federal officials, were entitled to absolute immunity for all discretionary acts within the scope of their authority. The Court of Appeals reversed, holding that the defendants were entitled only to the qualified immunity available to their counterparts in state government. *Economou v. U.S. Department of Agriculture*, 535 F.2d 688 (1976). Because of [438 U.S. 478, 481] the importance of immunity doctrine to both the vindication of constitutional guarantees and the effective functioning of government, we granted certiorari. 429 U.S. 1089.

I

Respondent controls Arthur N. Economou and Co., Inc., which was at one time registered with the Department of Agriculture as a commodity futures commission merchant. Most of respondent's factual allegations in this lawsuit focus on an earlier administrative proceeding in which the Department of Agriculture sought to revoke or suspend the company's registration. On February 19, 1970, following an audit, the Department of Agriculture issued an administrative complaint alleging that respondent, while a registered merchant, had willfully failed to maintain the minimum financial requirements prescribed by the Department. After another audit, an amended complaint was issued on June 22, 1970. A hearing was held before the Chief Hearing Examiner of the Department, who filed a recommendation sustaining the administrative complaint. The Judicial Officer of the Department, to whom the Secretary had delegated his decisional authority in enforcement proceedings, affirmed the Chief Hearing Examiner's decision. On respondent's petition for review, the Court of Appeals for the Second Circuit vacated the order of the Judicial Officer. It reasoned that "the essential finding of willfulness . . . was made in a proceeding instituted without the customary warning letter, which the Judicial Officer conceded might well have resulted in prompt correction of the claimed insufficiencies." *Economou v. U.S. Department of Agriculture*, 494 F.2d 519 (1974).

While the administrative complaint was pending before the Judicial Officer, respondent filed this lawsuit in Federal District Court. Respondent sought initially to enjoin the progress of the administrative proceeding, but he was unsuccessful in that regard. On March 31, 1975, respondent filed a second [438 U.S. 478, 482] amended complaint seeking damages. Named as defendants were the individuals who had served as Secretary and Assistant Secretary of Agriculture during the relevant events; the Judicial Officer and Chief Hearing Examiner; several officials in the Commodity Exchange Authority; 2 the Agriculture Department attorney who had prosecuted the enforcement proceeding; and several of the auditors who had investigated respondent or were witnesses against respondent. 3

The complaint stated that prior to the issuance of the administrative complaints respondent had been "sharply critical of the staff and operations of Defendants and carried on a vociferous campaign for the reform of Defendant Commodity Exchange Authority to obtain more effective regulation of commodity trading." App. 157-158. The complaint also stated that, some time prior to the issuance of the February 19 complaint, respondent and his company had ceased to engage in activities regulated by the defendants. The complaint charged that each of the administrative complaints had been issued without the notice or warning required by law; that the defendants had furnished the complaints "to interested persons and others without furnishing respondent's answers as well"; and that following the issuance of the amended complaint, the defendants had issued a "deceptive" press release that "falsely indicated to the public that [respondent's] financial resources had deteriorated, when Defendants knew that their statement was untrue and so acknowledge[d] previously that said assertion was untrue." *Ibid.* 4

The complaint then presented 10 "causes of action," some [438 U.S. 478, 483] of which purported to state claims for damages under the United States Constitution. For example, the first "cause of action" alleged that respondent had been denied due process of law because the defendants had instituted unauthorized proceedings against him without proper notice and with the knowledge that respondent was no longer subject to their regulatory jurisdiction. The third "cause of action" stated that by means of such actions "the Defendants discouraged and chilled the campaign of criticism [plaintiff] directed against them, and thereby deprived the [plaintiff] of [his] rights to free expression guaranteed by the First Amendment of the United States Constitution." 5

The defendants moved to dismiss the complaint on the ground that "as to the individual defendants it is barred by the doctrine of official immunity . . ." *Id.*, at 163. The defendants relied on an affidavit submitted earlier in the litigation by the attorney who had prosecuted the original administrative complaint against respondent. He stated that the Secretary of Agriculture had had no involvement with the case and that each of the other named defendants had acted "within the course of his official duties." *Id.*, at 142-149.

The District Court, apparently relying on the plurality opinion in *Barr v. Matteo*, 360 U.S. 564 (1959), held that the individual defendants would be entitled to immunity if they could show that "their alleged unconstitutional acts were [438 U.S. 478, 484] within the outer perimeter of their authority and discretionary." App. to Pet. for Cert. 25a. After examining the nature of the acts alleged in the complaint, the District Court concluded: "Since the individual defendants have shown that their alleged unconstitutional acts were both within the scope of their authority and discretionary, we dismiss the second amended complaint as to them." 6 *Id.*, at 28a.

The Court of Appeals for the Second Circuit reversed the District Court's judgment of dismissal with respect to the individual defendants. *Economou v. U.S. Department of Agriculture*, 535 F.2d 688 (1976). The Court of Appeals reasoned that *Barr v. Matteo*, *supra*, did not "represen[t] the last word in this evolving area," 535 F.2d, at 691, because principles governing the immunity of officials of the Executive Branch had been elucidated in later decisions dealing with constitutional claims against state officials. E. g., *Pierson v. Ray*, 386 U.S. 547 (1967); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Wood v. Strickland*, 420 U.S. 308 (1975). These opinions were understood to establish that officials of the Executive Branch exercising discretionary functions did not need the protection of an absolute immunity from suit, but only a qualified immunity based on good faith and reasonable grounds. The Court of Appeals rejected a proposed distinction between suits against state officials sued pursuant to 42 U.S.C. 1983 and suits against federal officials under the Constitution, noting that "[o]ther circuits have also concluded that the Supreme Court's development of official immunity doctrine in 1983 suits against state officials applies with equal force to federal officers sued on a cause of action derived directly from the Constitution, since both types of suits serve the same function of protecting citizens against violations of their constitutional rights by government officials." 535 F.2d, at 695 n. 7. The Court of Appeals recognized [438 U.S. 478, 485] that under *Imbler v. Pachtman*, 424 U.S. 409 (1976), state prosecutors were entitled to absolute immunity from 1983 damages liability but reasoned that Agriculture Department officials performing analogous functions did not require such an immunity because their cases turned more on documentary proof than on the veracity of witnesses and because their work did not generally involve the same constraints of time and information present in criminal cases. 535 F.2d, at 696 n. 8. The court concluded that all of the defendants were "adequately protected by permitting them to avail themselves of the defense of qualified 'good faith, reasonable grounds' immunity of the type approved by the Supreme Court in *Scheuer* and *Wood*." *Id.*, at 696. After noting that summary judgment would be available to the defendants if there were no genuine factual issues for trial, the Court of Appeals remanded the case for further proceedings.

II

The single submission by the United States on behalf of petitioners is that all of the federal officials sued in this case are absolutely immune from any liability for damages even if in the course of enforcing the relevant statutes they infringed respondent's constitutional rights and even if the violation was knowing and deliberate. Although the position is earnestly and ably presented by the United States, we are quite sure that it is unsound and consequently reject it.

In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), the victim of an arrest and search claimed to be violative of the Fourth Amendment brought suit for damages against the responsible federal agents. Repeating the declaration in *Marbury v. Madison*, 1 Cranch 137, 163 (1803), that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws," 403 U.S., at 397, and stating that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty," *id.*, at 395, we rejected the claim [438 U.S. 478, 486] that the plaintiff's remedy lay only in the state court under state law, with the Fourth Amendment operating merely to nullify a defense of federal authorization. We held that a violation of the Fourth Amendment by federal agents gives rise to a cause of action for damages consequent upon the unconstitutional conduct. *Ibid.* 7

Bivens established that compensable injury to a constitutionally protected interest could be vindicated by a suit for damages invoking the general federal-question jurisdiction of the federal courts, 8 but we reserved the question whether the agents involved were "immune from liability by virtue of their official position," and remanded the case for that determination. On remand, the Court of Appeals for the Second Circuit, as has every other Court of Appeals that has faced the question, 9 held that the agents were not absolutely immune and that the public interest would be sufficiently protected by according the agents and their superiors a qualified immunity.

In our view, the Courts of Appeals have reached sound results. We cannot agree with the United States that our prior cases are to the contrary and support the rule it now urges us to embrace. Indeed, as we see it, the Government's [438 U.S. 478, 487] submission is contrary to the course of decision in this Court from the very early days of the Republic.

The Government places principal reliance on *Barr v. Matteo*, 360 U.S. 564 (1959). In that case, the acting director of an agency had been sued for malicious defamation by two employees whose suspension for misconduct he had announced in a press release. The defendant claimed an absolute or qualified privilege, but the trial court rejected both and the jury returned a verdict for plaintiff.

In the 1958 Term, 10 the Court granted certiorari in *Barr* "to determine whether in the circumstances of this case petitioner's claim of absolute privilege should have stood as a bar to maintenance of the suit despite the allegations of malice made in the complaint." *Id.*, at 569. The Court was divided in reversing the judgment of the Court of Appeals, and there was no opinion for the Court. 11 The plurality opinion inquired whether the conduct complained of was among those [438 U.S. 478, 488] "matters committed by law to [the official's] control" and concluded, after an analysis of the specific circumstances, that the press release was within the "outer perimeter of [his] line of duty" and was "an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively." *Id.*, at 575. The plurality then held that under *Spalding v. Vilas*, 161 U.S. 483 (1896), the act was privileged and that the officer could not be held liable for the tort of defamation despite the allegations of malice. 12 *Barr* clearly held that a false and damaging publication, the issuance of which was otherwise within the official's authority, was not itself actionable and would not become so by being issued maliciously. The Court did not choose to discuss whether the director's privilege would be

defeated by showing that he was without reasonable grounds for believing his release was true or that he knew that it was false, although the issue was in the case as it came from the Court of Appeals. 13 [438 U.S. 478, 489]

Barr does not control this case. It did not address the liability of the acting director had his conduct not been within the outer limits of his duties, but from the care with which the Court inquired into the scope of his authority, it may be inferred that had the release been unauthorized, and surely if the issuance of press releases had been expressly forbidden by statute, the claim of absolute immunity would not have been upheld. The inference is supported by the fact that MR. JUSTICE STEWART, although agreeing with the principles announced by Mr. Justice Harlan, dissented and would have rejected the immunity claim because the press release, in his view, was not action in the line of duty. 360 U.S., at 592. It is apparent also that a quite different question would have been presented had the officer ignored an express statutory or constitutional limitation on his authority.

Barr did not, therefore, purport to depart from the general rule, which long prevailed, that a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers. The immunity of federal executive officials began as a means of protecting them in the execution of their federal statutory duties from criminal or civil actions based on state law. See *Osborn v. Bank of the United States*, 9 Wheat. 738, 865-866 (1824). 14 A federal [438 U.S. 478, 490] official who acted outside of his federal statutory authority would be held strictly liable for his trespassory acts. For example, *Little v. Barreme*, 2 Cranch 170 (1804), held the commander of an American warship liable in damages for the seizure of a Danish cargo ship on the high seas. Congress had directed the President to intercept any vessels reasonably suspected of being en route to a French port, but the President had authorized the seizure of suspected vessels whether going to or from French ports, and the Danish vessel seized was en route from a forbidden destination. The Court, speaking through Mr. Chief Justice Marshall, held that the President's instructions could not "change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass." *Id.*, at 179. Although there was probable cause to believe that the ship was engaged in traffic with the French, the seizure at issue was not among that class of seizures that the Executive had been authorized by statute to effect. See also *Wise v. Withers*, 3 Cranch 331 (1806).

Bates v. Clark, 95 U.S. 204 (1877), was a similar case. The relevant statute directed seizures of alcoholic beverages in Indian country, but the seizure at issue, which was made upon the orders of a superior, was not made in Indian country. The "objection fatal to all this class of defenses is that in that locality [the seizing officers] were utterly without any authority in the premises" and hence were answerable in damages. *Id.*, at 209.

As these cases demonstrate, a federal official was protected for action tortious under state law only if his acts were authorized by controlling federal law. "To make out his defence he must show that his authority was sufficient in law to protect him." *Cunningham v. Macon & Brunswick R. Co.*, 109 U.S. 446, 452 (1883); *Belknap v. Schild*, 161 U.S. 10, 19 (1896). Since an unconstitutional act, even if authorized by statute, was viewed as not authorized in contemplation of [438 U.S. 478, 491] law, there could be no immunity defense. 15 See *United States v. Lee*, 106 U.S. 196, 218 -223 (1882); *Virginia Coupon Cases*, 114 U.S. 269, 285 -292 (1885). 16

In both *Barreme* and *Bates*, the officers did not merely mistakenly conclude that the circumstances warranted a particular seizure, but failed to observe the limitations on their authority by making seizures not within the category or type of seizures they were authorized to make. *Kendall v. Stokes*, 3 How. 87 (1845), addressed a different situation. The case involved a suit against the Postmaster General for erroneously suspending payments to a creditor of the Post Office. Examining and, if necessary, suspending payments to creditors were among the Postmaster's normal duties, and it appeared that he

had simply made a mistake in the exercise of the discretion conferred upon him. He was held not liable in damages since "a public officer, acting to the best of his judgment and from a sense of duty, in a matter of account with an individual [is not] liable in an action for an error of judgment." *Id.*, at 97-98. Having "the right to examine into this account" and the right to suspend it in the proper circumstances, *id.*, at 98, the officer was not liable in damages if he fell into error, provided, however, that he acted "from a sense of public duty and without malice." *Id.*, at 99.

Four years later, in a case involving military discipline, the Court issued a similar ruling, exculpating the defendant [438 U.S. 478, 492] officer because of the failure to prove that he had exceeded his jurisdiction or had exercised it in a malicious or willfully erroneous manner: "[I]t is not enough to show he committed an error of judgment, but it must have been a malicious and wilful error." *Wilkes v. Dinsman*, 7 How. 89, 131 (1849).

In *Spalding v. Vilas*, 161 U.S. 483 (1896), on which the Government relies, the principal issue was whether the malicious motive of an officer would render him liable in damages for injury inflicted by his official act that otherwise was within the scope of his authority. The Postmaster General was sued for circulating among the postmasters a notice that assertedly injured the reputation of the plaintiff and interfered with his contractual relationships. The Court first inquired as to the Postmaster General's authority to issue the notice. In doing so, it "recognize[d] a distinction between action taken by the head of a Department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision." *Id.*, at 498. Concluding that the circular issued by the Postmaster General "was not unauthorized by law, nor beyond the scope of his official duties," the Court then addressed the major question in the case - whether the action could be "maintained because of the allegation that what the officer did was done maliciously?" *Id.*, at 493. Its holding was that the head of a department could not be "held liable to a civil suit for damages on account of official communications made by him pursuant to an act of Congress, and in respect of matters within his authority," however improper his motives might have been. *Id.*, at 498. Because the Postmaster General in issuing the circular in question "did not exceed his authority, nor pass the line of his duty," *id.*, at 499, it was irrelevant that he might have acted maliciously. 17 [438 U.S. 478, 493]

Spalding made clear that a malicious intent will not subject a public officer to liability for performing his authorized duties as to which he would otherwise not be subject to damages liability. 18 But *Spalding* did not involve conduct manifestly or otherwise beyond the authority of the official, nor did it involve a mistake of either law or fact in construing or applying the statute. 19 It did not purport to immunize officials [438 U.S. 478, 494] who ignore limitations on their authority imposed by law. Although the "manifestly or palpably" standard for examining the reach of official power may have been suggested as a gloss on *Barreme*, *Bates*, *Kendall*, and *Wilkes*, none of those cases was overruled. 20 It is also evident that *Spalding* presented no claim that the officer was liable in damages because he had acted in violation of a limitation placed upon his conduct by the United States Constitution. If any inference is to be drawn from *Spalding* in any of these respects, it is that the official would not be excused from liability if he failed to observe obvious statutory or constitutional limitations on his powers or if his conduct was a manifestly erroneous application of the statute.

Insofar as cases in this Court dealing with the immunity or privilege of federal officers are concerned, 21 this is where the matter stood until *Barr v. Matteo*. There, as we have set out above, immunity was granted even though the publication contained a factual error, which was not the case in *Spalding*. The plurality opinion and judgment in *Barr* also appear - [438 U.S. 478, 495] although without any discussion of the matter - to have extended absolute immunity to an officer who was authorized to issue press releases, who was assumed to know that the press release he issued was false and who therefore was

deliberately misusing his authority. Accepting this extension of immunity with respect to state tort claims, however, we are confident that Barr did not purport to protect an official who has not only committed a wrong under local law, but also violated those fundamental principles of fairness embodied in the Constitution. 22 Whatever level of protection from state interference is appropriate for federal officials executing their duties under federal law, it cannot be doubted that these officials, even when acting pursuant to congressional authorization, are subject to the restraints imposed by the Federal Constitution.

The liability of officials who have exceeded constitutional limits was not confronted in either Barr or Spalding. Neither of those cases supports the Government's position. Beyond that, however, neither case purported to abolish the liability of federal officers for actions manifestly beyond their line of duty; and if they are accountable when they stray beyond the plain limits of their statutory authority, it would be incongruous to hold that they may nevertheless willfully or knowingly violate constitutional rights without fear of liability.

Although it is true that the Court has not dealt with this [438 U.S. 478, 496] issue with respect to federal officers, 23 we have several times addressed the immunity of state officers when sued under 42 U.S.C. 1983 for alleged violations of constitutional rights. These decisions are instructive for present purposes.

III

Pierson v. Ray, 386 U.S. 547 (1967), decided that 1983 was not intended to abrogate the immunity of state judges which existed under the common law and which the Court had held applicable to federal judges in Bradley v. Fisher, 13 Wall. 335 (1872). Pierson also presented the issue "whether immunity was available to that segment of the executive branch of a state government that is . . . most frequently exposed to situations which can give rise to claims under 1983 - the local police officer." Scheuer v. Rhodes, 416 U.S. at 244-245. Relying on the common law, we held that police officers were entitled to a defense of "good faith and probable cause," even though an arrest might subsequently be proved to be unconstitutional. We observed, however, that "[t]he common law has never granted police officers an absolute and unqualified immunity, and the officers in this case do not claim that they are entitled to one." 386 U.S., at 555.

In Scheuer v. Rhodes, supra, the issue was whether "higher officers of the executive branch" of state governments were immune from liability under 1983 for violations of constitutionally protected rights. 416 U.S., at 246. There, the Governor of a State, the senior and subordinate officers of the state National Guard, and a state university president had been sued on the allegation that they had suppressed a civil disturbance [438 U.S. 478, 497] in an unconstitutional manner. We explained that the doctrine of official immunity from 1983 liability, although not constitutionally grounded and essentially a matter of statutory construction, was based on two mutually dependent rationales:

"(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." 416 U.S., at 240.

The opinion also recognized that executive branch officers must often act swiftly and on the basis of factual information supplied by others, constraints which become even more acute in the "atmosphere of confusion, ambiguity, and swiftly moving events" created by a civil disturbance. Id., at 246-247. Although quoting at length from Barr v. Matteo, 24 we did not believe that there was a need for absolute immunity from 1983 liability for these high-ranking state officials. Rather the considerations

discussed above indicated:

"[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being 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. It is the [438 U.S. 478, 498] existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." 416 U.S., at 247 -248.

Subsequent decisions have applied the Scheuer standard in other contexts. In Wood v. Strickland, 420 U.S. 308 (1975), school administrators were held entitled to claim a similar qualified immunity. A school board member would lose his immunity from a 1983 suit only if "he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student." 420 U.S., at 322. In O'Connor v. Donaldson, 422 U.S. 563 (1975), we applied the same standard to the superintendent of a state hospital. In Procunier v. Navarette, 434 U.S. 555 (1978), we held that prison administrators would be adequately protected by the qualified immunity outlined in Scheuer and Wood. We emphasized, however, that, at least in the absence of some showing of malice, an official would not be held liable in damages under 1983 unless the constitutional right he was alleged to have violated was "clearly established" at the time of the violation.

None of these decisions with respect to state officials furnishes any support for the submission of the United States that federal officials are absolutely immune from liability for their constitutional transgressions. On the contrary, with impressive unanimity, the Federal Courts of Appeals have concluded that federal officials should receive no greater degree of protection from constitutional claims than their counterparts in state government. 25 Subsequent to Scheuer, the [438 U.S. 478, 499] Court of Appeals for the Fourth Circuit concluded that "[a]lthough Scheuer involved a suit against state executive officers, the court's discussion of the qualified nature of executive immunity would appear to be equally applicable to federal executive officers." States Marine Lines v. Shultz, 498 F.2d 1146, 1159 (1974). In the view of the Court of Appeals for the Second Circuit,

"it would be 'incongruous and confusing, to say the least' to develop different standards of immunity for state officials sued under 1983 and federal officers sued on similar grounds under causes of action founded directly on the Constitution." Economou v. U.S. Dept. of Agriculture, 535 F.2d, at 695 n. 7, quoting Bivens v. Six Unknown Fed. Narcotics Agents, 456 F.2d 1339, 1346-1347 (CA2 1972) (on remand). 26

The Court of Appeals for the Ninth Circuit has reasoned:

"[Defendants] offer no significant reason for distinguishing, as far as the immunity doctrine is concerned, between litigation under 1983 against state officers and actions against federal officers alleging violation of constitutional rights under the general federal question statute. In contrast, the practical advantage of having just one federal [438 U.S. 478, 500] immunity doctrine for suits arising under federal law is self-evident. Further, the rights at stake in a suit brought directly under the Bill of Rights are no less worthy of full protection than the constitutional and statutory rights protected by 1983." Mark v. Groff, 521 F.2d 1376, 1380 (1975).

Other courts have reached similar conclusions. E. g., Apton v. Wilson, 165 U.S. App. D.C. 22, 506 F.2d

83 (1974); *Brubaker v. King*, 505 F.2d 534 (CA7 1974); see *Weir v. Muller*, 527 F.2d 872 (CA5 1976); *Paton v. La Prade*, 524 F.2d 862 (CA3 1975); *Jones v. United States*, 536 F.2d 269 (CA8 1976); *G. M. Leasing Corp. v. United States*, 560 F.2d 1011 (CA10 1977). 27

We agree with the perception of these courts that, in the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under 1983. The constitutional injuries made actionable by 1983 are of no greater magnitude than those for which federal officials may be responsible. The pressures and uncertainties facing decisionmakers in state government are little if at all different from those affecting federal officials. 28 We see no sense [438 U.S. 478, 501] in holding a state governor liable but immunizing the head of a federal department; in holding the administrator of a federal hospital immune where the superintendent of a state hospital would be liable; in protecting the warden of a federal prison where the warden of a state prison would be vulnerable; or in distinguishing between state and federal police participating in the same investigation. Surely, federal officials should enjoy no greater zone of protection when they violate federal constitutional rules than do state officers.

The Government argues that the cases involving state officials are distinguishable because they reflect the need to preserve the effectiveness of the right of action authorized by 1983. But as we discuss more fully below, the cause of action recognized in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), would similarly be "drained of meaning" if federal officials were entitled to absolute immunity for their constitutional transgressions. Cf. *Scheuer v. Rhodes*, 416 U.S., at 248 .

Moreover, the Government's analysis would place undue emphasis on the congressional origins of the cause of action in determining the level of immunity. It has been observed more than once that the law of privilege as a defense to damages actions against officers of Government has "in large [438 U.S. 478, 502] part been of judicial making." *Barr v. Matteo*, 360 U.S., at 569 ; *Doe v. McMillan*, 412 U.S. 306, 318 (1973). Section 1 of the Civil Rights Act of 1871 29 - the predecessor of 1983 - said nothing about immunity for state officials. It mandated that any person who under color of state law subjected another to the deprivation of his constitutional rights would be liable to the injured party in an action at law. 30 This [438 U.S. 478, 503] Court nevertheless ascertained and announced what it deemed to be the appropriate type of immunity from 1983 liability in a variety of contexts. *Pierson v. Ray*, 386 U.S. 547 (1967); *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Scheuer v. Rhodes*, *supra*. The federal courts are equally competent to determine the appropriate level of immunity where the suit is a direct claim under the Federal Constitution against a federal officer.

The presence or absence of congressional authorization for suits against federal officials is, of course, relevant to the question whether to infer a right of action for damages for a particular violation of the Constitution. In *Bivens*, the Court noted the "absence of affirmative action by Congress" and therefore looked for "special factors counselling hesitation." 403 U.S., at 396 . Absent congressional authorization, a court may also be impelled to think more carefully about whether the type of injury sustained by the plaintiff is normally compensable in damages, *id.*, at 397, and whether the courts are qualified to handle the types of questions raised by the plaintiff's claim, see *id.*, at 409 (Harlan, J., concurring in judgment).

But once this analysis is completed, there is no reason to return again to the absence of congressional authorization in resolving the question of immunity. 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. Since our decision in *Scheuer* was intended to guide the federal courts in resolving this

tension in the myriad factual situations in which it might arise, we see no reason why it should not supply the governing principles for resolving this dilemma in the case of federal officials. The Court's opinion in *Scheuer* relied on precedents dealing with federal as well as state officials, analyzed the issue of executive immunity [438 U.S. 478, 504] in terms of general policy considerations, and stated its conclusion, quoted *supra*, in the same universal terms. The analysis presented in that case cannot be limited to actions against state officials.

Accordingly, without congressional directions to the contrary, we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under 1983 and suits brought directly under the Constitution against federal officials. The 1983 action was provided to vindicate federal constitutional rights. That Congress decided, after the passage of the Fourteenth Amendment, to enact legislation specifically requiring state officials to respond in federal court for their failures to observe the constitutional limitations on their powers is hardly a reason for excusing their federal counterparts for the identical constitutional transgressions. To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head.

IV

As we have said, the decision in *Bivens* established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official. As Mr. Justice Harlan, concurring in the judgment, pointed out, the action for damages recognized in *Bivens* could be a vital means of providing redress for persons whose constitutional rights have been violated. The barrier of sovereign immunity is frequently impenetrable. ³¹ Injunctive or declaratory relief is useless to a person who has already been injured. "For [438 U.S. 478, 505] people in *Bivens*' shoes, it is damages or nothing." 403 U.S., at 410.

Our opinion in *Bivens* put aside the immunity question; but we could not have contemplated that immunity would be absolute. ³² If, as the Government argues, all officials exercising discretion were exempt from personal liability, a suit under the Constitution could provide no redress to the injured citizen, nor would it in any degree deter federal officials from committing constitutional wrongs. Moreover, no compensation would be available from the Government, for the Tort Claims Act prohibits recovery for injuries stemming from discretionary acts, even when that discretion has been abused. ³³

The extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees. The broad authority possessed by these officials enables them to direct their subordinates to undertake a wide range of projects - including some which may infringe such important personal interests as liberty, property, and free speech. It makes [438 U.S. 478, 506] little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.

Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *United States v. Lee*, 106 U.S., at 220.

See also *Marbury v. Madison*, 1 Cranch 137 (1803); *Scheuer v. Rhodes*, 416 U.S., at 239 -240. In light of this principle, federal 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.

This is not to say that considerations of public policy fail to support a limited immunity for federal executive officials. We consider here, as we did in *Scheuer*, the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority. Yet *Scheuer* and other cases have recognized 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 [438 U.S. 478, 507] unduly interfere with the exercise of official judgment. We therefore hold that, in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer*, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business. 34

The *Scheuer* principle of only qualified immunity for constitutional violations is consistent with *Barr v. Matteo*, 360 U.S. 564 (1959), *Spalding v. Vilas*, 161 U.S. 483 (1896), and *Kendall v. Stokes*, 3 How. 87 (1847). Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law. But we see no substantial basis for holding, as the United States would have us do, that executive officers generally may with impunity discharge their duties in a way that is known to them to violate the United States Constitution or in a manner that they should know transgresses a clearly established constitutional rule. The principle should prove as workable in suits against federal officials as it has in the context of suits against state officials. Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive [438 U.S. 478, 508] a motion to dismiss. Moreover, the Court recognized in *Scheuer* that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. 35 See 416 U.S., at 250. In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.

V

Although a qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations, our decisions recognize that there are some officials whose special functions require a full exemption from liability. E. g., *Bradley v. Fisher*, 13 Wall. 335 (1872); *Imbler v. Pachtman*, 424 U.S. 409 (1976). In each case, we have undertaken "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Id.*, at 421.

In *Bradley v. Fisher*, the Court analyzed the need for absolute immunity to protect judges from lawsuits claiming that their decisions had been tainted by improper motives. The Court began by noting that the principle of immunity for acts done by judges "in the exercise of their judicial functions" had been "the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country." 13 Wall., at 347. The Court explained that the value of this rule was

proved by experience. [438 U.S. 478, 509] Judges were often called to decide "[c]ontroversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings." *Id.*, at 348. Such adjudications invariably produced at least one losing party, who would "accep[t] anything but the soundness of the decision in explanation of the action of the judge." *Ibid.* "Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge." *Ibid.* If a civil action could be maintained against a judge by virtue of an allegation of malice, judges would lose "that independence without which no judiciary can either be respectable or useful." *Id.*, at 347. Thus, judges were held to be immune from civil suit "for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction." *Id.*, at 354. 36

The principle of *Bradley* was extended to federal prosecutors through the summary affirmance in *Yaselli v. Goff*, 275 U.S. 503 (1927), *aff'g* 12 F.2d 396 (CA2 1926). The Court of Appeals in that case discussed in detail the common-law precedents extending absolute immunity to parties participating in the judicial process: judges, grand jurors, petit jurors, advocates, and witnesses. Grand jurors had received absolute immunity "lest they should be biased with the fear of being [438 U.S. 478, 510] harassed by a vicious suit for acting according to their consciences (the danger of which might easily be insinuated where powerful men are warmly engaged in a cause and thoroughly prepossessed of the justice of the side which they espouse)." *Id.*, at 403, quoting 1 W. Hawkins, *Pleas of the Crown* 349 (6th ed. 1787). The court then reasoned that "[t]he public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up, performs much the same function as a grand jury." 12 F.2d, at 404, quoting *Smith v. Parman*, 101 Kan. 115, 116, 165 P. 663 (1917). The court held the prosecutor in that case immune from suit for malicious prosecution and this Court, citing *Bradley v. Fisher*, *supra*, affirmed.

We recently reaffirmed the holding of *Yaselli v. Goff* in *Imbler v. Pachtman*, *supra*, a suit against a state prosecutor under 1983. The Court's examination of the leading precedents led to the conclusion that "[t]he common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties." 424 U.S., at 422-423. The prosecutor's role in the criminal justice system was likely to provoke "with some frequency" retaliatory suits by angry defendants. *Id.*, at 425. A qualified immunity might have an adverse effect on the functioning of the criminal justice system, not only by discouraging the initiation of prosecutions, see *id.*, at 426 n. 24, but also by affecting the prosecutor's conduct of the trial.

"Attaining the system's goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence. . . . If prosecutors were hampered in exercising their judgment as to the use of . . . witnesses by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence." *Id.*, at 426. [438 U.S. 478, 511]

In light of these and other practical considerations, the Court held that the defendant in that case was entitled to absolute immunity with respect to his activities as an advocate, "activities [which] were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." *Id.*, at 430. 37

Despite these precedents, the Court of Appeals concluded that all of the defendants in this case - including the Chief Hearing Examiner, Judicial Officer, and prosecuting attorney - were entitled to only a qualified immunity. The Court of Appeals reasoned that officials within the Executive Branch generally have more circumscribed discretion and pointed out that, unlike a judge, officials of the

Executive Branch would face no conflict of interest if their legal representation was provided by the Executive Branch. The Court of Appeals recognized that "some of the Agriculture Department officials may be analogized to criminal prosecutors, in that they initiated the proceedings against [respondent], and presented evidence therein," 535 F.2d, at 696 n. 8, but found that attorneys in administrative proceedings did not face the same "serious constraints of time and even information" which this Court has found to be present frequently in criminal cases. See *Imbler v. Pachtman*, 424 U.S., at 425.

We think that the Court of Appeals placed undue emphasis on the fact that the officials sued here are - from an administrative perspective - employees of the Executive Branch. Judges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities. This point is underlined by the fact that prosecutors - themselves members of the Executive [438 U.S. 478, 512] Branch - are also absolutely immune. "It is the functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as 'quasi-judicial' officers, and their immunities being termed 'quasi-judicial' as well." *Id.*, at 423 n. 20.

The cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location. As the Bradley Court suggested, 13 Wall., at 348-349, controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. See *Pierson v. Ray*, 386 U.S., at 554. Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.

At the same time, the safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct. The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by judges. 38 Advocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court. Jurors are carefully screened to remove all possibility of bias. Witnesses are, of course, subject to the rigors of cross-examination and the penalty of perjury. Because these features of the judicial process tend to enhance the reliability of information and the impartiality of the decisionmaking process, there is a less pressing need for individual suits to correct constitutional error.

We think that adjudication within a federal administrative [438 U.S. 478, 513] agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages. The conflicts which federal hearing examiners seek to resolve are every bit as fractious as those which come to court. As the Bradley opinion points out: "When the controversy involves questions affecting large amounts of property or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision, often finds vent in imputations of [malice]." 13 Wall., at 348. Moreover, federal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process. The proceedings are adversary in nature. See 5 U.S.C. 555 (b) (1976 ed.). They are conducted before a trier of fact insulated from political influence. See 554 (d). A party is entitled to present his case by oral or documentary evidence, 556 (d), and the transcript of testimony and exhibits together with the pleadings constitute the exclusive record for decision. 556 (e). The parties are entitled to know the findings and conclusions on all of the issues of fact, law, or discretion presented on the record. 557 (c).

There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is "functionally comparable" to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. See 556 (c). More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency. Prior to the Administrative Procedure Act, there was considerable concern that persons hearing administrative cases at the trial level could not exercise independent judgment because [438 U.S. 478, 514] they were required to perform prosecutorial and investigative functions as well as their judicial work, see, e. g., *Wong Yang Sung v. McGrath*, 339 U.S. 33, 36 -41 (1950), and because they were often subordinate to executive officials within the agency, see *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 131 (1953). Since the securing of fair and competent hearing personnel was viewed as "the heart of formal administrative adjudication," Final Report of the Attorney General's Committee on Administrative Procedure 46 (1941), the Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners. They may not perform duties inconsistent with their duties as hearing examiners. 5 U.S.C. 3105 (1976 ed.). When conducting a hearing under 5 of the APA, 5 U.S.C. 554 (1976 ed.), a hearing examiner is not responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of investigative or prosecution functions for the agency. 5 U.S.C. 554 (d) (2) (1976 ed.). Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. 554 (d) (1). Hearing examiners must be assigned to cases in rotation so far as is practicable. 3105. They may be removed only for good cause established and determined by the Civil Service Commission after a hearing on the record. 7521. Their pay is also controlled by the Civil Service Commission.

In light of these safeguards, we think that the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women. We therefore hold that persons subject to these restraints and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts. Those who complain of error in such proceedings must seek agency or judicial review. [438 U.S. 478, 515]

We also believe that agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts. The decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought. The Commodity Futures Trading Commission, for example, may initiate proceedings whenever it has "reason to believe" that any person "is violating or has violated any of the provisions of this chapter or of the rules, regulations, or orders of the Commission." 7 U.S.C. 9 (1976 ed.). A range of sanctions is open to it. *Ibid*.

The discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted if their immunity from damages arising from that decision was less than complete. Cf. *Imbler v. Pachtman*, 424 U.S., at 426 n. 24. While there is not likely to be anyone willing and legally able to seek damages from the officials if they do not authorize the administrative proceeding, cf. *id.*, at 438 (WHITE, J., concurring in judgment), there is a serious danger that the decision to authorize proceedings will provoke a retaliatory response. An individual targeted by an administrative proceeding will react angrily and may seek vengeance in the courts. A corporation will muster all of its financial and legal resources in an effort to prevent administrative sanctions. "When

millions may turn on regulatory decisions, there is a strong incentive to counter-attack." 39

The defendant in an enforcement proceeding has ample opportunity to challenge the legality of the proceeding. An [438 U.S. 478, 516] administrator's decision to proceed with a case is subject to scrutiny in the proceeding itself. The respondent may present his evidence to an impartial trier of fact and obtain an independent judgment as to whether the prosecution is justified. His claims that the proceeding is unconstitutional may also be heard by the courts. Indeed, respondent in this case was able to quash the administrative order entered against him by means of judicial review. See *Economou v. U.S. Department of Agriculture*, 494 F.2d 519 (CA2 1974).

We believe that agency officials must make the decision to move forward with an administrative proceeding free from intimidation or harassment. Because the legal remedies already available to the defendant in such a proceeding provide sufficient checks on agency zeal, we hold that those officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity from damages liability for their parts in that decision.

We turn finally to the role of an agency attorney in conducting a trial and presenting evidence on the record to the trier of fact. We can see no substantial difference between the function of the agency attorney in presenting evidence in an agency hearing and the function of the prosecutor who brings evidence before a court. 40 In either case, the evidence [438 U.S. 478, 517] will be subject to attack through cross-examination, rebuttal, or reinterpretation by opposing counsel. Evidence which is false or unpersuasive should be rejected upon analysis by an impartial trier of fact. If agency attorneys were held personally liable in damages as guarantors of the quality of their evidence, they might hesitate to bring forward some witnesses or documents. "This is particularly so because it is very difficult if not impossible for attorneys to be absolutely certain of the objective truth or falsity of the testimony which they present." *Imbler v. Pachtman*, supra, at 440 (WHITE, J., concurring in judgment). Apart from the possible unfairness to agency personnel, the agency would often be denied relevant evidence. Cf. *Imbler v. Pachtman*, supra, at 426. Administrative agencies can act in the public interest only if they can adjudicate on the basis of a complete record. We therefore hold that an agency attorney who arranges for the presentation of evidence on the record in the course of an adjudication is absolutely immune from suits based on the introduction of such evidence.

VI

There remains the task of applying the foregoing principles to the claims against the particular petitioner-defendants involved in this case. Rather than attempt this here in the first instance, we vacate the judgment of the Court of Appeals and remand the case to that court with instructions to remand the case to the District Court for further proceedings consistent with this opinion.

So ordered.

Footnotes

[Footnote 1] The individual Arthur N. Economou, his corporation Arthur N. Economou and Co., and another corporation which he heads, the American Board of Trade, Inc., were all plaintiffs in this action and are all respondents in this Court. For convenience, however, we refer to Arthur N. Economou and his interests in the singular, as "respondent."

[Footnote 2] These individuals included the Administrator of the Commodity Exchange Authority, the Director of its Compliance Division, the Deputy Director of its Registration and Audit Division, and the

Regional Administrator for the New York Region.

[[Footnote 3](#)] Also named as defendants were the United States, the Department of Agriculture and the Commodity Exchange Authority.

[[Footnote 4](#)] More detailed allegations concerning many of the incidents charged in the complaint were contained in an affidavit filed by respondent in connection with his earlier efforts to obtain injunctive relief.

[[Footnote 5](#)] In the second "cause of action," respondent stated that the defendants had issued administrative orders "illegal and punitive in nature" against him when he was no longer subject to their authority. The fourth "cause of action" alleged, inter alia, that respondent's rights to due process of law and to privacy as guaranteed by the Federal Constitution had been infringed by the furnishing of the administrative complaints to interested persons without respondent's answers. The fifth "cause of action" similarly alleged as a violation of due process that defendants had issued a press release containing facts the defendants knew or should have known were false. Respondent's remaining "causes of action" allege common-law torts: abuse of legal process, malicious prosecution, invasion of privacy, negligence, and trespass.

[[Footnote 6](#)] The District Court held that the complaint was barred as to the Government agency defendants by the doctrine of sovereign immunity.

[[Footnote 7](#)] Although we had noted in *Bell v. Hood*, 327 U.S. 678 (1946), that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief," *id.*, at 684, the specific question faced in *Bivens* had been reserved.

[[Footnote 8](#)] The Court's opinion in *Bivens* concerned only a Fourth Amendment claim and therefore did not discuss what other personal interests were similarly protected by provisions of the Constitution. We do not consider that issue here. Cf. *Doe v. McMillan*, 412 U.S. 306, 325 (1973).

[[Footnote 9](#)] *Black v. United States*, 534 F.2d 524 (CA2 1976); *States Marine Lines v. Shultz*, 498 F.2d 1146 (CA4 1974); *Mark v. Groff*, 521 F.2d 1376 (CA9 1975); *G. M. Leasing Corp. v. United States*, 560 F.2d 1011 (CA10 1977); *Apton v. Wilson*, 165 U.S. App. D.C. 22, 506 F.2d 83 (1974); see *Paton v. La Prade*, 524 F.2d 862 (CA3 1975); *Weir v. Muller*, 527 F.2d 872 (CA5 1976); *Brubaker v. King*, 505 F.2d 534 (CA7 1974); *Jones v. United States*, 536 F.2d 269 (CA8 1976).

[[Footnote 10](#)] The case had been before the Court once before, during the 1957 Term. After the trial, the defendant had appealed only the denial of an absolute privilege. The Court of Appeals affirmed the judgment against him on the ground that the press release exceeded his authority. *Barr v. Matteo*, 100 U.S. App. D.C. 319, 244 F.2d 767 (1957). This Court vacated that judgment, 355 U.S. 171 (1957), directing the Court of Appeals to consider the qualified-privilege question. This the Court of Appeals did, 103 U.S. App. D.C. 176, 256 F.2d 890 (1958), holding as this Court described it, that "the press release was protected by a qualified privilege, but that there was evidence from which a jury could reasonably conclude that petitioner had acted maliciously, or had spoken with lack of reasonable grounds for believing that his statement was true, and that either conclusion would defeat the qualified privilege." 360 U.S., at 569. Because the case was remanded for a new trial, the defendant sought certiorari a second time.

[[Footnote 11](#)] Mr. Justice Harlan's opinion in *Barr* was joined by three other Justices. The majority

was formed through the concurrence in the judgment of Mr. Justice Black, who emphasized in a separate opinion the strong public interest in encouraging federal employees to ventilate their ideas about how the Government should be run. *Id.*, at 576.

[Footnote 12] The Court wrote a similar opinion and entered a similar judgment in a companion case, *Howard v. Lyons*, 360 U.S. 593 (1959). There a complaint for defamation under state law alleged the publication of a deliberate and knowing falsehood by a federal officer. Judgment was entered for the officer before trial on the ground that the release was within the limits of his authority. The judgment was reversed in part by the Court of Appeals on the ground that in some respects the defendant was entitled to only a qualified privilege. This Court reversed, ruling that Barr controlled.

[Footnote 13] See n. 10, *supra*. The question presented in the Government's petition for certiorari was broadly framed:

"Whether the absolute immunity from defamation suits, accorded officials of the Government with respect to acts done within the scope of their official authority, extends to statements to the press by high policy-making officers, below cabinet or comparable rank, concerning matters committed by law to their control or supervision." *Pet. for Cert. in Barr v. Matteo*, O. T. 1958, No. 350, p. 2.

This question might be viewed as subsuming the question whether the official's immunity extended to situations in which the official had no reasonable grounds for believing that a statement was true.

[Footnote 14] Mr. Chief Justice Marshall explained:

"An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of congress to imply, without expressing, this very exemption from State control The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them are protected while in the line of duty; and yet this protection is not expressed in any act of congress. It is incidental to, and is implied in, the several acts by which these institutions are created, and is secured to the individuals employed in them by the judicial power alone"

[Footnote 15] Indeed, there appears to have been some doubt as to whether even an Act of Congress would immunize federal officials from suits seeking damages for constitutional violations. See *Milligan v. Hovey*, 17 F. Cas. 380 (No. 9,605) (CC Ind. 1871); *Griffin v. Wilcox*, 21 Ind. 370, 372-373 (1863). See generally Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 50-51 (1972).

[Footnote 16] While the Virginia Coupon Cases, like *United States v. Lee*, involved a suit for the return of specific property, the principles espoused therein are equally applicable to a suit for damages and were later so applied. *Atchison, Topeka & Santa Fe R. Co. v. O'Connor*, 223 U.S. 280, 287 (1912).

[Footnote 17] An individual might be viewed as acting maliciously where "the circumstances show that he is not disagreeably impressed by the fact that [438 U.S. 478, 493] his action injuriously affects the claims of particular individuals." 161 U.S., at 499.

[Footnote 18] In addressing the liability of the Postmaster General, the Court referred to *Bradley v.*

Fisher, 13 Wall. 335 (1872), which the Court described as holding that "judges of courts of superior or general jurisdiction [are] not liable to civil suits for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." 161 U.S., at 493. The Court was of the view that "the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law." *Id.*, at 498. The Court plainly applied *Bradley v. Fisher* principles in holding that proof of malice would not subject an executive officer to liability for performing an act which he was authorized to perform by federal law. These principles, however, were not said to be completely applicable; and, as indicated in the text, the Court revealed no intention to overrule *Kendall v. Stokes* or *Wilkes* or to immunize an officer from liability for a willful misapplication of his authority. Also, on the face of the *Spalding* opinion, it would appear that an executive officer would be vulnerable if he took action "manifestly or palpably" beyond his authority or ignored a clear limitation on his enforcement powers.

[Footnote 19] MR. JUSTICE BRENNAN, dissenting in *Barr v. Matteo*, 360 U.S., at 587 n. 3, emphasized this point:

"The suit in *Spalding* seems to have been as much, if not more, a suit for malicious interference with advantageous relationships as a libel suit. The Court reviewed the facts and found no false statement. See 161 U.S., at 487-493. The case may stand for no more than the proposition that where a Cabinet officer publishes a statement, not factually inaccurate, relating to a matter within his Department's competence, he cannot [438 U.S. 478, 494] be charged with improper motives in publication. The Court's opinion leaned heavily on the fact that the contents of the statement (which were not on their face defamatory) were quite accurate, in support of its conclusion that publishing the statement was within the officer's discretion, foreclosing inquiry into his motives. *Id.*, at 489-493."

The *Barr* plurality did not disagree with this characterization of the law-suit in *Spalding*. See also *Gray*, *Private Wrongs of Public Servants*, 47 *Calif. L. Rev.* 303, 336 (1959).

[Footnote 20] Indeed, *Barreme* and *Bates* were cited with approval in a decision that was under submission with *Spalding* and was handed down a scant month before the judgment in *Spalding* was announced. *Belknap v. Schild*, 161 U.S. 10, 18 (1896).

[Footnote 21] During the period prior to *Barr*, the lower federal courts broadly extended *Spalding* in according absolute immunity to federal officials sued for common-law torts. E. g., *Jones v. Kennedy*, 73 *App. D.C.* 292, 121 *F.2d* 40, cert. denied, 314 U.S. 665 (1941); *Papagianakis v. The Samos*, 186 *F.2d* 257 (CA4 1950), cert. denied, 341 U.S. 921 (1951). See cases collected in *Gray*, *supra* n. 19, at 337-338.

[Footnote 22] We view this case, in its present posture, as concerned only with constitutional issues. The District Court memorandum focused exclusively on respondent's constitutional claims. It appears from the language and reasoning of its opinion that the Court of Appeals was also essentially concerned with respondent's constitutional claims. See, e. g., 535 *F.2d*, at 695 n. 7. The Second Circuit has subsequently read *Economou* as limited to that context. See *Huntington Towers, Ltd. v. Franklin Nat. Bank*, 559 *F.2d* 863, 870, and n. 2 (1977), cert. denied sub nom. *Huntington Towers, Ltd. v. Federal Reserve Bank of N. Y.*, 434 U.S. 1012 (1978). The argument before us as well has focused on respondent's constitutional claims, and our holding is so limited.

[Footnote 23] Doc v. McMillan, 412 U.S. 306 (1973), did involve a constitutional claim for invasion of privacy - but in the special context of the Speech or Debate Clause. The Court held that the executive officials would be immune from suit only to the extent that the legislators at whose behest they printed and distributed the documents could claim the protection of the Speech or Debate Clause.

[Footnote 24] 416 U.S., at 247, quoting Barr v. Matteo, 360 U.S., at 573 -574. The Court spoke of Barr v. Matteo as arising "[i]n a context other than a 1983 suit." 416 U.S., at 247. Elsewhere in the opinion, however, the Court discussed Barr as arising "in the somewhat parallel context of the privilege of public officers from defamation actions." 416 U.S., at 242. The Court also relied on Spalding v. Vilas, 161 U.S. 483 (1896), without mentioning that that decision concerned federal officials. 416 U.S., at 242 n. 7, 246 n. 8.

[Footnote 25] As early as 1971, Judge, now Attorney General, Bell, concurring specially in a judgment of the Court of Appeals for the Fifth Circuit, [438 U.S. 478, 499] recorded his "continuing belief that all police and ancillary personnel in this nation, whether state or federal, should be subject to the same accountability under law for their conduct." Anderson v. Nosser, 438 F.2d 183, 205 (1971). He objected to the notion that there should be "one law for Athens and another for Rome." Ibid. It appears from a recent decision that the Fifth Circuit has abandoned the view he criticized. See Weir v. Muller, 527 F.2d 872 (1976).

[Footnote 26] Courts and judges have noted the "incongruity" that would arise if officials of the District of Columbia, who are not subject to 1983, were given absolute immunity while their counterparts in state government received qualified immunity. Bivens v. Six Unknown Fed. Narcotics Agents, 456 F.2d, at 1347; Carter v. Carlson, 144 U.S. App. D.C. 388, 401, 447 F.2d 358, 371 (1971) (Nichols, J., concurring), rev'd on other grounds sub nom. District of Columbia v. Carter, 409 U.S. 418 (1973).

[Footnote 27] The First and Sixth Circuits have recently accorded immunity to federal officials sued for common-law torts, without discussion of their views with respect to constitutional claims. Berberian v. Gibney, 514 F.2d 790 (CA1 1975); Mandel v. Nouse, 509 F.2d 1031 (CA6 1975).

[Footnote 28] In Apton v. Wilson, 165 U.S. App. D.C. 22, 32, 506 F.2d 83, 93 (1974), Judge Leventhal compared the Governor of a State with the highest officers of a federal executive department:

"The difference in office is relevant, for immunity depends in part upon 'scope of discretion and responsibilities of the office,' Scheuer v. Rhodes, supra, 416 U.S., at 247. . . . But the difference is not conclusive in this case. Like the highest executive officer of a state, the head of a Federal executive department has broad discretionary authority. Each is [438 U.S. 478, 501] called upon to act under circumstances where judgments are tentative and an unambiguously optimal course of action can be ascertained only in retrospect. Both officials have functions and responsibilities concerned with maintaining the public order; these may impel both officials to make decisions 'in an atmosphere of confusion, ambiguity, and swiftly moving events.' Scheuer v. Rhodes, supra, 416 U.S., at 247. . . . Having a wider territorial responsibility than the head of a state government, a Federal cabinet officer may be entitled to consult fewer sources and expend less effort inquiring into the circumstances of a localized problem. But these considerations go to the showing an officer vested with a qualified immunity must make in support of 'good faith belief;' they do not make the qualified immunity itself inappropriate. The head of an executive department, no less than the chief executive of a state, is adequately protected by a qualified immunity."

[Footnote 29] Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, provided in pertinent part:

"[A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law"

[Footnote 30] The purpose of 1 of the Civil Rights Act was not to abolish the immunities available at common law, see *Pierson v. Ray*, 386 U.S. 547, 554 (1967), but to insure that federal courts would have jurisdiction of constitutional claims against state officials. We explained in *District of Columbia v. Carter*, 409 U.S., at 427-428:

"At the time this Act was adopted, . . . there existed no general federal-question jurisdiction in the lower federal courts. Rather, Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws.' *Zwickler v. Koota*, 389 U.S. 241, 245 (1967). With the growing awareness that this reliance had been misplaced, however, Congress recognized the need for original federal court jurisdiction as a means to provide at least indirect federal control over the unconstitutional actions of state officials." (Footnotes omitted.)

The situation with respect to federal officials was entirely different: They were already subject to judicial control through the state courts, which were not particularly sympathetic to federal officials, or through the removal jurisdiction of the federal courts. See generally *Willingham v. Morgan*, 395 U.S. 402 (1969); *Tennessee v. Davis*, 100 U.S. 257 (1880). Moreover, in 1875 Congress vested the circuit courts with general federal-question jurisdiction, which encompassed many suits against federal officials. 18 Stat. 470. Thus, the absence of a statute similar to 1983 pertaining to federal officials cannot be the basis for an inference about the level of immunity appropriate to federal officials.

[Footnote 31] At the time of the *Bivens* decision, the Federal Tort Claims Act prohibited recovery against the Government for

"Any claim arising out of assault, battery, false imprisonment, false [438 U.S. 478, 505] arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. 2680 (h).

The statute was subsequently amended in light of *Bivens* to lift the bar against some of these claims when arising from the act of federal law enforcement officers. See 28 U.S.C. 2680 (h) (1976 ed.).

[Footnote 32] Mr. Justice Harlan, the author of the plurality opinion in *Barr*, noted that although "interests in efficient law enforcement . . . argue for a protective zone with respect to many types of Fourth Amendment violations . . . at the very least . . . a remedy would be available for the most flagrant and patently unjustified sorts of police conduct." *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S., at 411 (concurring in judgment).

[Footnote 33] Pursuant to 28 U.S.C. 2680 (1976 ed.), the Government is immune from

"(a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

See generally *Dalehite v. United States*, 346 U.S. 15 (1953).

[Footnote 34] The Government argued in *Bivens* that the plaintiff should be relegated to his traditional remedy at state law. "In this scheme the Fourth Amendment would serve merely to limit the extent to which the agents could defend the state law tort suit by asserting that their actions were a valid exercise of federal power: if the agents were shown to have violated the Fourth Amendment, such a defense would be lost to them and they would stand before the state law merely as private individuals." 403 U.S., at 390 -391. Although, as this passage makes clear, traditional doctrine did not accord immunity to officials who transgressed constitutional limits, we believe that federal officials sued by such traditional means should similarly be entitled to a Scheuer immunity.

[Footnote 35] The defendant official may also be able to assert on summary judgment some other common-law or constitutional privilege. For example, in this case the defendant officials may be able to argue that their issuance of the press release was privileged as an accurate report on a matter of public record in an administrative proceeding. See *Handler & Klein, The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 *Harv. L. Rev.* 44, 61-62, 75-76 (1960). Of course, we do not decide this issue at this time.

[Footnote 36] In *Pierson v. Ray*, 386 U.S. 547 (1967), we recognized that state judges sued on constitutional claims pursuant to 1983 could claim a similar absolute immunity. The Court reasoned:

"It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." *Id.*, at 554.

[Footnote 37] The *Imbler* Court specifically reserved the question "whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate." 424 U.S., at 430 -431.

[Footnote 38] See generally *Handler & Klein*, *supra* n. 35, at 54-55.

[Footnote 39] *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution*, 184 U.S. App. D.C. 397, 401, 566 F.2d 289, 293 (1977), cert. pending, No. 76-418.

[Footnote 40] That prosecutors act under "serious constraints of time and even information" was not central to our decision in *Imbler*, for the same might be said of a wide variety of state and federal officials who enjoy only qualified immunity. See *Scheuer v. Rhodes*, 416 U.S., at 246 -247. Nor do we think that administrative enforcement proceedings may be distinguished from criminal prosecutions on the ground that the former often turn on documentary proof. The key point is that administrative personnel, like prosecutors, "often must decide, especially in cases of wide public interest, whether to proceed to trial where there is a sharp conflict in the evidence." *Imbler*, 424 U.S., at 426 n. 24. The complexity and quantity of documentary proof that may be adduced in a full-scale enforcement proceeding may make this decision even more difficult than the decision to prosecute a suspect.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE STEVENS join, concurring in part and dissenting in part.

I concur in that part of the Court's judgment which affords absolute immunity to those persons

performing adjudicatory functions within a federal agency, ante, at 514, [438 U.S. 478, 518] those who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication, ante, at 516, and those agency personnel who present evidence on the record in the course of an adjudication, ante, at 517. I cannot agree, however, with the Court's conclusion that in a suit for damages arising from allegedly unconstitutional action federal executive officials, regardless of their rank or the scope of their responsibilities, are entitled to only qualified immunity even when acting within the outer limits of their authority. The Court's protestations to the contrary notwithstanding, this decision seriously misconstrues our prior decisions, finds little support as a matter of logic or precedent, and perhaps most importantly, will, I fear, seriously "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties," *Gregoire v. Biddle*, 177 F.2d 579, 581 (CA2 1949) (Learned Hand, J.).

Most noticeable is the Court's unnaturally constrained reading of the landmark case of *Spalding v. Vilas*, 161 U.S. 483 (1896). The Court in that case did indeed hold that the actions taken by the Postmaster General were within the authority conferred upon him by Congress, and went on to hold that even though he had acted maliciously in carrying out the duties conferred upon him by Congress he was protected by official immunity. But the Court left no doubt that it would have reached the same result had it been alleged the official acts were unconstitutional.

"We are of the opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be [438 U.S. 478, 519] accorded to them in respect of their official acts." *Id.*, at 498.

The Court today attempts to explain away that language by observing that *Spalding* indicated no intention to overrule *Kendall v. Stokes*, 3 How. 87 (1845), or *Wilkes v. Dinsman*, 7 How. 89 (1849). See ante, at 493 n. 18. But as the Court itself observes, the Postmaster General was held not "liable in an action for an error of judgment" in *Kendall*, supra, at 98. The Court in *Wilkes*, supra, likewise exonerated the defendant. The Court did indicate in dictum in both those cases that a federal officer might be liable if he acted with malice, *Kendall*, supra, at 99; *Wilkes*, supra, at 131, but the holding in *Spalding* was, as even the Court is forced to admit today, see ante, at 492-493, directly contrary to those cases on that point. In short, *Spalding* clearly and inescapably stands for the proposition that high-ranking executive officials acting within the outer limits of their authority are absolutely immune from suit.

Indeed, the language from *Spalding* quoted above unquestionably applies with equal force in the case at bar. No one seriously contends that the Secretary of Agriculture or the Assistant Secretary, who are being sued for \$32 million in damages, had wandered completely off the official reservation in authorizing prosecution of respondent for violation of regulations promulgated by the Secretary for the regulation of "futures commission merchants," 7 U.S.C. 6 (1976 ed.). This is precisely what the Secretary and his assistants were empowered and required to do. That they would on occasion be mistaken in their judgment that a particular merchant had in fact violated the regulations is a necessary concomitant of any known system of administrative adjudication; that they acted "maliciously" gives no support to respondent's claim against them unless we are to overrule *Spalding*.

The Court's attempt to distinguish *Spalding* may be predicated [438 U.S. 478, 520] on a simpler but equally erroneous concept of immunity. At one point the Court observes that even under *Spalding* "an

executive officer would be vulnerable if he took action 'manifestly or palpably' beyond his authority or ignored a clear limitation on his enforcement powers." Ante, at 493 n. 18. From that proposition, which is undeniably accurate, the Court appears to conclude that anytime a plaintiff can paint his grievance in constitutional colors, the official is subject to damages unless he can prove he acted in good faith. After all, Congress would never "authorize" an official to engage in unconstitutional conduct. That this notion in fact underlines the Court's decision is strongly suggested by its discussion of numerous cases which supposedly support its position, but all of which in fact deal not with the question of what level of immunity a federal official may claim when acting within the outer limits of his authority, but rather with the question of whether he was in fact so acting. See ante, at 489-491.

Putting to one side the illogic and impracticability of distinguishing between constitutional and common-law claims for purposes of immunity, which will be discussed shortly, this sort of immunity analysis badly misses the mark. It amounts to saying that an official has immunity until someone alleges he has acted unconstitutionally. But that is no immunity at all: The "immunity" disappears at the very moment when it is needed. The critical inquiry in determining whether an official is entitled to claim immunity is not whether someone has in fact been injured by his action; that is part of the plaintiff's case in chief. The immunity defense turns on whether the action was one taken "when engaged in the discharge of duties imposed upon [the official] by law," Spalding, 161 U.S., at 498, or in other words, whether the official was acting within the outer bounds of his authority. Only if the immunity inquiry is approached in this manner does it have any meaning. That such a rule may occasionally result in individual injustices has never been doubted, but at least until [438 U.S. 478, 521] today, immunity has been accorded nevertheless. As Judge Learned Hand said in *Gregoire v. Biddle*, 177 F.2d, at 581:

"The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, 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. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. 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. . . ."

Indeed, in that very case Judge Hand laid bare the folly of approaching the question of immunity in the manner suggested today by the Court.

"The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the [438 U.S. 478, 522] whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. . . ." Ibid.

Barr v. Matteo, 360 U.S. 564 (1959), unfortunately fares little better at the Court's hand than Spalding. Here the Court at least recognizes and reaffirms the minimum proposition for which Barr stands - that executive officials are absolutely immune at least from actions predicated on common-law claims as long as they are acting within the outer limits of their authority. See ante, at 495. Barr is distinguished, however, on the ground that it did not involve a violation of "those fundamental principles of fairness embodied in the Constitution." Ibid. But if we allow a mere allegation of unconstitutionality, obviously unproved at the time made, to require a Cabinet-level official, charged with the enforcement of the responsibilities to which the complaint pertains, to lay aside his duties and defend such an action on the merits, the defense of official immunity will have been abolished in fact if not in form. The ease with which a constitutional claim may be pleaded in a case such as this, where a violation of statutory or judicial limits on agency action may be readily converted by any legal neophyte into a claim of denial of procedural due process under the Fifth Amendment, will assure that. The fact that the claim fails when put to trial will not prevent the consumption of time, effort, and money on the part of the defendant official in defending his actions on the merits. The result can only be damage to the "interests of the people," Spalding, supra, at 498, which "require[s] that due protection be accorded to [Cabinet officials] in respect of their official acts."

It likewise cannot seriously be argued that an official will be less deterred by the threat of liability for unconstitutional [438 U.S. 478, 523] conduct than for activities which might constitute a common-law tort. The fear that inhibits is that of a long, involved lawsuit and a significant money judgment, not the fear of liability for a certain type of claim. Thus, even viewing the question functionally - indeed, especially viewing the question functionally - the basis for a distinction between constitutional and common-law torts in this context is open to serious question. Even the logical justification for raising such a novel distinction is far from clear. That the Framers thought some rights sufficiently susceptible of legislative derogation that they should be enshrined in the Constitution does not necessarily indicate that the Framers likewise intended to establish an immutable hierarchy of rights in terms of their importance to individuals. The most heinous common-law tort surely cannot be less important to, or have less of an impact on, the aggrieved individual than a mere technical violation of a constitutional proscription.

The Court purports to find support for this distinction, and therefore this result, in the principles supposedly underlying *Marbury v. Madison*, 1 Cranch 137 (1803) and *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), and the fact that cognate state officials are not afforded absolute immunity for actions brought under 42 U.S.C. 1983. Undoubtedly these rationales have some superficial appeal, but none withstands careful analysis. *Marbury v. Madison*, supra, leaves no doubt that the high position of a Government official does not insulate his actions from judicial review. But that case, like numerous others which have followed, involved equitable-type relief by way of mandamus or injunction. In the present case, respondent sought damages in the amount of \$32 million. There is undoubtedly force to the argument that injunctive relief, in these cases where a court determines that an official defendant has violated a legal right of the plaintiff, sets the matter right only as to the future. But there is at least as much force to the argument [438 U.S. 478, 524] that the threat of injunctive relief without the possibility of damages in the case of a Cabinet official is a better tailoring of the competing need to vindicate individual rights, on the one hand, and the equally vital need, on the other, that federal officials exercising discretion will be unafraid to take vigorous action to protect the public interest.

The Court also suggests in sweeping terms that the cause of action recognized in *Bivens* would be "'drained of meaning' if federal officials were entitled to absolute immunity for their constitutional transgressions." Ante, at 501. But *Bivens* is a slender reed on which to rely when abrogating official immunity for Cabinet-level officials. In the first place, those officials most susceptible to claims under *Bivens* have historically been given only a qualified immunity. As the Court observed in *Pierson v.*

Ray, 386 U.S. 547, 555 (1967), "[t]he common law has never granted police officers an absolute and unqualified immunity. . . ." In any event, it certainly does not follow that a grant of absolute immunity to the Secretary and Assistant Secretary of Agriculture requires a like grant to federal law enforcement officials. But even more importantly, on the federal side, when Congress thinks redress of grievances is appropriate, it can and generally does waive sovereign immunity, allowing an action directly against the United States. This allows redress for deprivations of rights, while at the same time limiting the outside influences which might inhibit an official in the free and considered exercise of his official powers. In fact, Congress, making just these sorts of judgments with respect to the very causes of action which the Court suggests require abrogation of absolute immunity, has amended the Federal Tort Claims Act, see 28 U.S.C. 2680 (h) (1976 ed.), to allow suits against the United States on the basis of certain intentional torts if committed by federal "investigative or law enforcement officers."

The Court also looks to the question of immunity of state officials for causes arising under 1983 and, quoting a concurring [438 U.S. 478, 525] opinion in *Anderson v. Nosser*, 438 F.2d 183, 205 (CA5 1971), to the effect that there should not be "one law for Athens and another for Rome," finds no reason why those principles should not likewise apply when federal officers are the target. Homilies cannot replace analysis in this difficult area, however. And even a moment's reflection on the nature of the Bivens-type action and the purposes of 1983, as made abundantly clear in this Court's prior cases, supplies a compelling reason for distinguishing between the two different situations. In the first place, as made clear above, a grant of absolute immunity to high-ranking executive officials on the federal side would not eviscerate the cause of action recognized in Bivens. The officials who are the most likely defendants in a Bivens-type action have generally been accorded only a qualified immunity. But more importantly, Congress has expressly waived sovereign immunity for this type of suit. This permits a direct action against the Government, while limiting those risks which might "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." And the Federal Government can internally supervise and check its own officers. The Federal Government is not so situated that it can control state officials or strike this same balance, however. Hence the necessity of 1983 and the differing standards of immunity. As the Court observed in *District of Columbia v. Carter*, 409 U.S. 418 (1973):

"Although there are threads of many thoughts running through the debates on the 1871 Act, it seems clear that 1 of the Act, with which we are here concerned, was designed primarily in response to unwillingness or inability of the state governments to enforce their own laws against those violating the civil rights of others." *Id.*, at 426.

"[T]he [basic] rationale underlying Congress' decision not to enact legislation similar to 1983 with respect to [438 U.S. 478, 526] federal officials [was] the assumption that the Federal Government could keep its own officers under control. . . ." *Id.*, at 429-430.

The Court attempts to avoid the force of this argument by suggesting that the statute which vests federal courts with general federal-question jurisdiction is basically the equivalent of 1983. *Ante*, at 502 n. 30. But that suggestion evinces a basic misunderstanding of the difference between a statute which vests jurisdiction in federal courts, which are, as a constitutional matter, courts of limited jurisdiction, and a statute, or even a constitutional provision, which creates a private right of action. As even the Court's analysis in Bivens made clear, a statute giving jurisdiction to federal courts does not, in and of itself, create a right of action. And to date, the Court has not held that the Constitution itself creates a private right of action for damages except when federal law enforcement officials arrest someone and search his premises in violation of the Fourth Amendment. Thus, the Court's attempt to equate 1983 and 28 U.S.C. 1331 (1976 ed.) simply fails, and its further observation - that there should be no difference in immunity between state and federal officials - remains subject to serious doubt.

My biggest concern, however, is not with the illogic or impracticality of today's decision, but rather with the potential for disruption of Government that it invites. The steady increase in litigation, much of it directed against governmental officials and virtually all of which could be framed in constitutional terms, cannot escape the notice of even the most casual observer. From 1961 to 1977, the number of cases brought in the federal courts under civil rights statutes increased from 296 to 13,113. See Director of the Administrative Office of the United States Courts Ann. Rep. 189, Table 11 (1977); Ann. Rep. 173, Table 17 (1976). It simply defies logic and common experience to suggest that officials will not have this in the back of their minds when considering [438 U.S. 478, 527] what official course to pursue. It likewise strains credulity to suggest that this threat will only inhibit officials from taking action which they should not take in any event. It is the cases in which the grounds for action are doubtful, or in which the actor is timid, which will be affected by today's decision.

The Court, of course, recognizes this problem and suggests two solutions. First, judges, ever alert to the artful pleader, supposedly will weed out insubstantial claims. Ante, at 507. That, I fear, shows more optimism than prescience. Indeed, this very case, unquestionably frivolous in the extreme, belies any hope in that direction. And summary judgment on affidavits and the like is even more inappropriate when the central, and perhaps only, inquiry is the official's state of mind. See C. Wright, Law of Federal Courts 493 (3d ed. 1976) (It "is not feasible to resolve on motion for summary judgment cases involving state of mind"); Subin v. Goldsmith, 224 F.2d 753 (CA2 1955).

The second solution offered by the Court is even less satisfactory. The Court holds that in those special circumstances "where it is demonstrated that absolute immunity is essential for the conduct of the public business," absolute immunity will be extended. Ante, at 507. But this is a form of "absolute immunity" which in truth exists in name only. If, for example, the Secretary of Agriculture may never know until inquiry by a trial court whether there is a possibility that vexatious constitutional litigation will interfere with his decisionmaking process, the Secretary will obviously think not only twice but thrice about whether to prosecute a litigious commodities merchant who has played fast and loose with the regulations for his own profit. Careful consideration of the rights of every individual subject to his jurisdiction is one thing; a timorous reluctance to prosecute any of such individuals who have a reputation for using litigation as a defense weapon is quite another. Since Cabinet officials are mortal, [438 U.S. 478, 528] it is not likely that we shall get the precise judgmental balance desired in each of them, and it is because of these very human failings that the principles of Spalding, 161 U.S., at 498, dictate that absolute immunity be accorded once it be concluded by a court that a high-level executive official was "engaged in the discharge of duties imposed upon [him] by law." *

Today's opinion has shouldered a formidable task insofar as it seeks to justify the rejection of the views of the first Mr. Justice Harlan expressed in his opinion for the Court in Spalding v. Vilas, supra, and those of the second Mr. Justice Harlan expressed in his opinions in Barr v. Matteo, 360 U.S. 564 (1959), and its companion case of Howard v. Lyons, 360 U.S. 593 (1959). In terms of juridical jousting, if not in terms of placement in the judicial hierarchy, it has taken on at least as formidable a task when it disregards the powerful statement of Judge Learned Hand in Gregoire v. Biddle, 177 F.2d 579 (CA2 1949). [438 U.S. 478, 529]

History will surely not condemn the Court for its effort to achieve a more finely ground product from the judicial mill, a product which would both retain the necessary ability of public officials to govern and yet assure redress to those who are the victims of official wrongs. But if such a system of redress for official wrongs was indeed capable of being achieved in practice, it surely would not have been rejected by this Court speaking through the first Mr. Justice Harlan in 1896, by this Court speaking through the second Mr. Justice Harlan in 1959, and by Judge Learned Hand speaking for the Court of Appeals for the Second Circuit in 1948. These judges were not inexperienced neophytes who lacked the

vision or the ability to define immunity doctrine to accomplish that result had they thought it possible. Nor were they obsequious toadies in their attitude toward high-ranking officials of coordinate branches of the Federal Government. But they did see with more prescience than the Court does today, that there are inevitable trade-offs in connection with any doctrine of official liability and immunity. They forthrightly accepted the possibility that an occasional failure to redress a claim of official wrongdoing would result from the doctrine of absolute immunity which they espoused, viewing it as a lesser evil than the impairment of the ability of responsible public officials to govern.

But while I believe that history will look approvingly on the motives of the Court in reaching the result it does today, I do not believe that history will be charitable in its judgment of the all but inevitable result of the doctrine espoused by the Court in this case. That doctrine seeks to gain and hold a middle ground which, with all deference, I believe the teachings of those who were at least our equals suggest cannot long be held. That part of the Court's present opinion from which I dissent will, I fear, result in one of two evils, either one of which is markedly worse than the effect of according absolute immunity to the Secretary and the Assistant Secretary in this [438 U.S. 478, 530] case. The first of these evils would be a significant impairment of the ability of responsible public officials to carry out the duties imposed upon them by law. If that evil is to be avoided after today, it can be avoided only by a necessarily unprincipled and erratic judicial "screening" of claims such as those made in this case, an adherence to the form of the law while departing from its substance. Either one of these evils is far worse than the occasional failure to award damages caused by official wrongdoing, frankly and openly justified by the rule of *Spalding v. Vilas*, *Barr v. Matteo*, and *Gregoire v. Biddle*.

[Footnote *] The ultimate irony of today's decision is that in the area of common-law official immunity, a body of law fashioned and applied by judges, absolute immunity within the federal system is extended only to judges and prosecutors functioning in the judicial system. See *Bradley v. Fisher*, 13 Wall. 335 (1872); *Yaselli v. Goff*, 12 F.2d 396 (CA2 1926), summarily aff'd, 275 U.S. 503 (1927). Similarly, where this Court has interpreted 42 U.S.C. 1983 in the light of common-law doctrines of official immunity, again only judges and prosecutors are accorded absolute immunity. See *Pierson v. Ray*, 386 U.S. 547 (1967); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Imbler v. Pachtman*, 424 U.S. 409 (1976). If one were to hazard an informed guess as to why such a distinction in treatment between judges and prosecutors, on the one hand, and other public officials on the other, obtains, mine would be that those who decide the common law know through personal experience the sort of pressures that might exist for such decisionmakers in the absence of absolute immunity, but may not know or may have forgotten that similar pressures exist in the case of nonjudicial public officials to whom difficult decisions are committed. But the cynical among us might not unreasonably feel that this is simply another unfortunate example of judges treating those who are not part of the judicial machinery as "lesser breeds without the law." [438 U.S. 478, 531]



U.S. Supreme Court

**LARSON V. DOMESTIC & FOREIGN COMMERCE CORPORATION , 337 U.S.
682 (1949)**

337 U.S. 682

LARSON

v.

DOMESTIC & FOREIGN COMMERCE CORPORATION.

No. 31.

Argued Nov. 12, 1948.

Decided June 27, 1949.

Rehearing Denied Oct. 10, 1949.

See .[Larson v. Domestic & Foreign Commerce Corporation 337 U.S. 682 (1949)]

[337 U.S. 682 , 684] Mr. H. G. Morison, Washington, D.C., for petitioner.

Mr. T. Peter Ansberry, Washington, D.C., for respondent.

Mr. Chief Justice VINSON delivered the opinion of the Court.

This suit was brought in the United States District Court for the District of Columbia by the Domestic & Foreign Commerce Corporation against Robert M. Littlejohn, the then head of the War Assets Administration. 1 The complaint alleged that the Administration had sold certain surplus coal to the plaintiff; that the Administrator refused to deliver the coal but, on the contrary, had entered into a new contract to sell it to others. The prayer was for an injunction prohibiting the Administrator from selling or delivering the coal to any one other than the plaintiff and for a declaration that the sale to the plaintiff was valid and the sale to the second purchaser invalid.

A temporary restraining order was issued ex parte. At the subsequent hearing on the issuance of a preliminary injunction, the defendant moved to dismiss the complaint on the ground, among others, that the court did not have jurisdiction because the suit was one against the United [337 U.S. 682 , 685] States. The motion was granted. The Court of Appeals reversed, holding that the jurisdictional capacity of the court depended on whether or not title to the coal had passed. 2 Since this was also one of the questions on the merits, it remanded the case for trial. We granted certiorari, 333 U.S. 872 .3

The controversy on the merits concerns the interpretation to be given to the contract of sale. The War Assets Administration construed the contract as requiring the plaintiff to deposit funds to pay for the coal in advance and, when an unsatisfactory letter of credit was offered in place of a deposit, it considered that the contract was breached. The respondent, on the other hand, construed the contract as requiring payment only on delivery of the documents covering the coal shipment. In its view, it was not

obliged to deposit any funds in advance of shipment and, therefore, had not breached the contract by failing to do so.

A second question, related to but different from the question of breach, was whether legal title to the coal had passed to the responden when the contract was made. If the contract required the deposit of funds then, of course, title could not pass until the contract terms were complied with. If, on the other hand, the contract required payment only on the delivery of documents, a question remained as to whether title nevertheless passed at the time the contract was made.

Since these questions were not decided by the courts below we do not pass on them here. They are important only insofar as they illuminate the basis on which it [337 U.S. 682, 686] was claimed that the district court had jurisdiction over the suit. It was not alleged that the contract for the sale of the coal was a contract with the officer personally. 4 The basis of the action, on the contrary, was that a contract had been entered into with the United States. Nor was it claimed that the Administrator had any personal interest in this coal or, indeed, that he himself had taken any wrongful action. The complaint was directed against him because of his official function as chief of the War Assets Administration. 5 It asked for an injunction against him in that capacity, and against 'his agents, assistants, deputies and employees and all persons acting or assuming to act under their direction.' The relief sought was, in short, relief against the Administration for wrongs allegedly committed by subordinate officials in that Administration. The question presented to the courts below was whether such an injunction was barred by the sovereign's immunity from suit.

Before answering that question it is perhaps advisable to state clearly what is and what is not involved. There is not involved any question of the immunization of Government officers against responsibility for their wrongful actions. If those actions are such as to create a personal liability, whether sounding in tort or in contract, the fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit against him. *Sloan Shipyards Corp. v. Emergency Fleet Corp.*, 1922, 258 U.S. 549, 567, 388. As was said in *Brady* [337 U.S. 682, 687] *v. Roosevelt S.S. Co.*, 1943, 317 U.S. 575, 580, 428, the principle that an agent is liable for his own torts 'is an ancient one and applies even to certain acts of public officers or public instrumentalities.' But the existence of a right to sue the officer is not the issue in this case. The issue here is whether this particular suit is not also, in effect, a suit against the sovereign. If it is, it must fail, whether or not the officer might otherwise be suable.

If the denomination of the party defendant by the plaintiff were the sole test of whether a suit was against the officer individually or against his principal, the sovereign, our task would be easy. Our decision then would be that the United States is not being sued here because it is not named as a party. This would be simple and would not leave room for controversy. But controversy there has been, in this field above all others, because it has long been established that the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign. 6 In a suit against the officer to recover damages for the agent's personal actions that question is easily answered. The judgment sought will not require action by the sovereign or disturb the sovereign's property. There is, therefore, no jurisdictional difficulty. 7 The question becomes difficult [337 U.S. 682, 688] and the area of controversy is entered when the suit is not one for damages but for specific relief: i.e., the recovery of specific property or monies, ejection from land, or injunction either directing or restraining the defendant officer's actions. In each such case the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. For the sovereign can act only through agents and, when the agents' actions are restrained, the sovereign itself may, through him, be restrained. As indicated, this question does not arise because of any distinction between law and equity. It arises whenever suit is brought against an officer of the sovereign in which the relief

sought from him is not compensation for an alleged wrong but, rather, the prevention or discontinuance, in rem, of the wrong. In each such case the compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against the individual officer. If it is, then the suit is barred, not because it is a suit against an officer of the Government, but because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction.

The relief sought in this case was not the payment of damages by the individual defendant. 8 To the contrary, [337 U.S. 682 , 689] it was asked that the court order the War Assets Administrator, his agents, assistants, deputies and employees and all persons acting under their direction, not to sell the coal involved and not to deliver it to anyone other than the respondent. 9 The district court held that this was relief against the sovereign and therefore dismissed the suit. We agree.

There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. If the officer purports to act as an individual and not as an official, a suit directed against that action is not a suit against the sovereign. If the War Assets Administrator had completed a sale of his personal home, he presumably could be enjoined from later conveying it to a third person. On a similar theory, where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are ultra vires his authority and therefore may be made the object of specific relief. It is important to note [337 U.S. 682 , 690] that in such cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient. And, since the jurisdiction of the court to hear the case may depend, as we have recently recognized,¹⁰ upon the decision which it ultimately reaches on the merits, it is necessary that the plaintiff set out in his complaint the statutory limitation on which he relies.

A second type of case is that in which the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional. Actions for habeas corpus against a warden and injunctions against the threatened enforcement of unconstitutional statutes are familiar examples of this type. Here, too, the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign. The only difference is that in this case the power has been conferred in form but the grant is lacking in substance because of its constitutional invalidity.

These two types have frequently been recognized by this Court as the only ones in which a restraint may be obtained against the conduct of Government officials. The rule was stated by Mr. Justice Hughes in *Philadelphia Co. v. Stimson*, 1912, 223 U.S. 605, 620, 344, where he said: '* * * in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been [337 U.S. 682 , 691] applied with respect to state officers seeking to enforce unconstitutional enactments. (Citing cases.) And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred.' ¹¹

It is not contended by the respondent that the present case falls within either of these categories. There was no claim made that the Administrator and his agents, etc., were acting unconstitutionally or pursuant to an unconstitutional grant of power. Nor was there any allegation of a limitation on the Administrator's delegated power to refuse shipment in cases in which he believed the United States was not obliged to deliver. There was, it is true, an allegation that the Administrator was acting 'illegally,' and that the refusal to deliver was 'unauthorized.' But these allegations were not based and did not purport to be based upon any lack of delegated power. 12 Nor could they be, since [337 U.S. 682 , 692]

the Administrator was empowered by the sovereign to administer a general sales program encompassing the negotiation of contracts, the shipment of goods and the receipt of payment. A normal concomitant of such powers, as a matter of general agency law, is the power to refuse delivery when, in the agent's view, delivery is not called for under a contract and the power to sell goods which the agent believes are still his principal's to sell.

The respondent's contention, which the Court of Appeals sustained, was that there exists a third category of cases in which the action of a Government official may be restrained or directed. If, says the respondent, an officer of the Government wrongly takes or holds specific property to which the plaintiff has title then his taking or holding is a tort, and 'illegal' as a matter of general law, whether or not it be within his delegated powers. He may therefore be sued individually to prevent the 'illegal' taking or to recover the property 'illegally' held.

If this is an adequate theory on which to rest the conclusion that the relief asked is not relief against the sovereign, then the respondent's complaint made out a sufficient basis for jurisdiction. The complaint alleged that the respondent's contract with the United States was an immediate contract of sale under which title to the coal had passed. The coal was thus alleged to be the respondent's coal, not the United States' coal. Retention of it by the Administrator after demand was claimed to be a conversion; sale to a third party would aggravate the conversion. Since these actions were tortious they were 'illegal' in the respondent's sense and hence were contended to be individual actions, not properly taken on behalf of the United States, which could be enjoined without making the United States a party.

We believe the theory to be erroneous. It confuses the doctrine of sovereign immunity with the requirement [337 U.S. 682, 693] that a plaintiff state a cause of action. It is a prerequisite to the maintenance of any action for specific relief that the plaintiff claim an invasion of his legal rights, either past or threatened. He must, therefore, allege conduct which is 'illegal' in the sense that the respondent suggests. If he does not, he has not stated a cause of action. This is true whether the conduct complained of is sovereign or individual. In a suit against an agency of the sovereign, as in any other suit, it is therefore necessary that the plaintiff claim an invasion of his recognized legal rights. If he does not do so, the suit must fail even if he alleges that the agent acted beyond statutory authority¹³ or unconstitutionally. ¹⁴ But, in a suit against an agency of the sovereign, it is not sufficient that he make such a claim. Since the sovereign may not be sued, it must also appear that the action to be restrained or directed is not action of the sovereign. The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet that requirement. True, it establishes a wrong to the plaintiff. But it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign. If he is exercising such powers the action is the sovereign's and a suit to enjoin it may not be brought unless the sovereign has consented.

It is argued, however, that the commission of a tort cannot be authorized by the sovereign. Therefore, the argument goes, the allegation that a Government officer has acted or is threatening to act tortiously toward the plaintiff is sufficient to support the claim that he has acted beyond his delegated powers. It is on this contention that the respondent's position fundamentally rests, since it is admitted that, if the action to be prevented [337 U.S. 682, 694] or compelled is authorized by the sovereign, the demand for it must fail as a demand against the sovereign. It has been said, in a very special sense, that, as a matter of agency law, a principal may never lawfully authorize the commission of a tort by his agent. But that statement, in its usual context, is only a way of saying that an agent's liability for torts committed by him cannot be avoided by pleading the direction or authorization of his principal. ¹⁵ The agent is himself liable whether or not he has been authorized or even directed to commit the tort. This, of course, does not mean that the principal is not liable nor that the tortious action may not be regarded as the action of the principal. It does not mean, therefore, that the agent's action, because tortious, is, for

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that reason alone, ultra vires his authority. An argument to that effect was at one time advanced in connection with corporate agents, in an effort to avoid corporate liability for torts, but was decisively rejected. 16 [337 U.S. 682, 695] There is, therefore, nothing in the law of agency which lends support to the contention that an officer's tortious action is ipso facto beyond his delegated powers. Nor, do we think, is there anything in the doctrine of sovereign immunity which requires us to adopt such a view as regards Government agencies. If, of course, it is assumed that the basis of the doctrine of sovereign immunity is the thesis that the king can do no wrong then it may be also assumed that if the king's agent does wrong that action cannot be the action of the king. It is on some such argument that the position of the respondent rests. It is argued that an officer given the power to make decisions is only given the power to make correct decisions. If his decisions are not correct, then his action based on those decisions is beyond his authority and not the action of the sovereign. There is no warrant for such a contention in cases in which the decision made by the officer does not relate to the terms of his statutory authority. Certainly the jurisdiction of a court to decide a case does not disappear if its decision on the merits is wrong. And we have heretofore rejected the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so. *Adams v. Nagle*, 1938, 303 U.S. 532, 542, 692. We therefore reject the contention here. We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency. A Government officer is not thereby necessarily immunized from liability, if his action is such that a liability would be imposed by the general law of torts. But the action itself cannot be enjoined or directed, since it is also the action of the sovereign. [337 U.S. 682, 696] *United States v. Lee*, 1882, 106 U.S. 196, is said to have established the rule for which the respondent contends. It did not. It represents, rather, a specific application of the constitutional exception to the doctrine of sovereign immunity. The suit there was against federal officers to recover land held by them, within the scope of their authority, as a United States military station and cemetery. The question at issue was the validity of a tax sale under which the United States, at least in the view of the officers, had obtained title to the property. The plaintiff alleged that the sale was invalid and that title to the land was in him. The Court held that if he was right the defendants' possession of the land was illegal and a suit against them was not a suit against the sovereign. Prima facie, this holding would appear to support the contention of the plaintiff. Examination of the *Lee* case, however, indicates that the basis of the decision was the assumed lack of the defendants' constitutional authority to hold the land against the plaintiff. The Court said (106 U.S. at page 219, 1 S.Ct. at page 260):

'It is not pretended, as the case now stands, that the president had any lawful authority to (take the land), or that the legislative body could give him any such authority except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of every one who asserts authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only that no such power is given, but that it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation. [337 U.S. 682, 697] 'Shall it be said * * * that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without any lawful authority, without any process of law, and without any compensation, because the president has ordered it and his officers are in possession?'

The Court thus assumed that if title had been in the plaintiff the taking of the property by the defendants would be a taking without just compensation and, therefore, an unconstitutional action. 17 On that assumption, and only on that assumption, the defendants' possession of the property was an unconstitutional use of their power and was, therefore, not validly authorized by the sovereign. For that reason, a suit for specific relief, to obtain the property, was not a suit against the sovereign and could be

maintained against the defendants as individuals.

The Lee case, therefore, offers no support to the contention that a claim of title to property held by an officer of the sovereign is, of itself, sufficient to demonstrate that the officer holding the property is not validly empowered by the sovereign to do so. Only where there is a claim that the holding constitutes an unconstitutional taking of property without just compensation does the Lee case require that conclusion. 18 The cases which followed Lee's [337 U.S. 682 , 698] do not require a different result. There are a great number of such cases and, as this Court has itself remarked, it is not 'an easy matter to reconcile all the decisions of the Court in this class of cases.'¹⁹ With only one possible exception, however, specific relief in connection with property held or injured by officers of the sovereign acting in the name of the sovereign has been granted only where there was a claim that the taking of the property or the injury to it was not the action of the sovereign because unconstitutional²⁰ or beyond the officer's statutory pow- [337 U.S. 682 , 699] ers. 21 Certainly, the Court has repeatedly stated these to be the cases in which such relief could be granted. 22 A contrary doctrine was stated in *Goltra v. Weeks*, 1926, 271 U.S. 536 . In that case the United States had leased barges to the plaintiff under a contract which gave it a right to repossess under certain conditions. Believing that those conditions existed, officers of the Government attempted to repossess the barges. The Court held that a suit to enjoin them from doing so was not a suit against the United States. The Court said that the taking of the barges was alleged to be a trespass and hence 'illegal.' Therefore, the actions of the officers were personal actions, not the actions of the United States and injunction against them would not be injunction against the United States. 271 U.S. at page 544, 46 S.Ct. at page 616. For this conclusion the Court relied entirely upon the opinion of Mr. Justice Hughes in *Philadelphia Co. v. Stimson*, 1912, 223 U.S. 605 . The reliance was misplaced since the opinion in [337 U.S. 682 , 700] that case clearly and specifically rested on the claim that there was a lack of statutory power to act, not simply on a claim of tortious injury to the plaintiff. 23

Opposed to the rationale of the *Goltra* opinion is the decision, by Mr. Justice Holmes, in *Goldberg v. Daniels*, 1913, 231 U.S. 218 . There, as here, the question concerned the effect of a claimed sale of Government surplus property. The plaintiff submitted a sealed bid for a surplus war vessel, accompanied in that case by a certified check as payment in advance. When the bids were opened his was the highest. The Secretary of the Navy, however, determined not to accept the bid and refused to deliver the vessel. The plaintiff brought mandamus. He alleged that the sale was complete when the bids were opened and that the ownership of the vessel was therefore in him, and he asked that the Secretary be compelled to deliver it. The lower courts examined the details of the transaction and concluded that the sale was not complete until the Secretary announced his acceptance of the bid. On appeal here, it was expressly held that it was not necessary to decide whether the lower courts were correct. The suit must fail as one against the United States, the Court said, whether or not the sale was complete. In so holding the Court said, in effect, that the question of title was immaterial to the court's jurisdiction. Wrongful the Secretary's conduct might be, but a suit to relieve the wrong by obtaining the vessel would inter- [337 U.S. 682 , 701] fere with the sovereign behind its back and hence must fail. 24

Both cases are pressed upon us. The petitioner argues, and correctly, that the result in the *Goldberg* case calls for a similar result in this case—a dismissal of the suit for want of jurisdiction. The respondent argues, with equal correctness, that the theory of the *Goltra* opinion—that an allegation that the actions of Government officers are wrongful under general law is sufficient to show that they are 'unauthorized'—calls for an affirmance of the decision below. Since we must therefore resolve the conflict in doctrine²⁵ we adhere to the rule applied in the *Goldberg* case and to the principle which has been frequently repeated by this Court, both before and after the *Goltra* case: the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the [337 U.S. 682 , 702] plaintiff's property) can be regarded as so 'illegal' as to permit a suit for a specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their

exercise in the particular case, are constitutionally void. 26 [337 U.S. 682 , 703] The application of this principle to the present case is clear. The very basis of the respondent's action is that the Administrator was an officer of the Government, validly appointed to administer its sales program and therefore authorized to enter, through his subordinates, into a binding contract concerning the sale of the Government's coal. There is no allegation of any statutory limitation on his powers as a sales agent. In the absence of such a limitation he, like any other sales agent, had the power and the duty to construe such contracts and to refuse delivery in cases in which he believed that the contract terms had not been complied with. His action in so doing in this case was, therefore, within his authority even if, for purposes of decision here, we assume that his construction was wrong and that title to the coal had, in fact, passed to the respondent under the contract. There is no claim that his constituted an unconstitutional taking. 27 It was, therefore, inescapably the action of the United States and the effort to enjoin it must fail as an effort to enjoin the United States.

It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. The Congress has increasingly permitted such suits to be maintained against [337 U.S. 682 , 704] the sovereign and we should give hospitable scope to that trend. 28 But the reasoning is not applicable to suits for specific relief. For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. As was early recognized, 'the interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief. * * *'29

There are limits, of course. Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions. But in the absence of a claim of constitutional limitation, the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention outweighs the possible disadvantage to the citizen in being relegated to the recovery of money damages after the event.

It is argued that a sales agency such as the War Assets Administration, is not the type of agency which requires the protection from direct judicial interference which the doctrine of sovereign immunity confers. We do not doubt that there may be some activities of the Government which do not require such protection. There are others [337 U.S. 682 , 705] in which the necessity of immunity is apparent. But it is not for this Court to examine the necessity in each case. That is a function of the Congress. The Congress has, in many cases, entrusted the business of the Government to agencies which may contract in their own names and which are subject to suit in their own names. In other cases it has permitted suits for damages, but, significantly, not for specific relief, in the Court of Claims. The differentiations as to remedy which the Congress has erected would be rendered nugatory if the basis on which they rest—the assumed immunity of the sovereign from suit in the absence of consent—were undermined by an unwarranted extension of the Lee doctrine.

The cause is reversed with directions that the complaint be dismissed.

It is so ordered.

Reversed with directions.

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Mr. Justice DOUGLAS.

I think that the principles announced by the Court are the ones which should govern the selling of government property. Less strict applications of those principles would cause intolerable interference with public administration. To make the right to sue the officer turn on whether by the law of sales title had passed to the buyer would clog this governmental function with intolerable burdens. So I have joined the Court's opinion.

Mr. Justice RUTLEDGE concurs in the result.

Mr. Justice JACKSON dissents.

Mr. Justice FRANKFURTER, with whom Mr. Justice BURTON concurs, dissenting.

Case-by-case adjudication gives to the judicial process the impact of actuality and thereby saves it from the hazards of generalizations insufficiently nourished by [337 U.S. 682, 706] experience. There is, however, an attendant weakness to a system that purports to pass merely on what are deemed to be the particular circumstances of a case. Consciously or unconsciously the pronouncements in an opinion too often exceed the justification of the circumstances on which they are based, or, contrariwise, judicial preoccupation with the claims of the immediate leads to a succession of ad hoc determinations making for eventual confusion and conflict. There comes a time when the general considerations underlying each specific situation must be exposed in order to bring the too unruly instances into more fruitful harmony. The case before us presents one of those problems for the rational solution of which it becomes necessary, as a matter of judicial self-respect, to take soundings in order to know where we are and whither we are going.

The case before us is this.

The Government had some surplus coal at an Army camp in Texas. On March 11, 1947, the War Assets Administration, through the Regional Office in Dallas, Texas, invited a bid from the plaintiff, respondent here, for purchase of the coal. The Dallas office expressed thus its approval of the bid submitted by the plaintiff: '* * * your terms of placing \$17,500 with the First National Bank, Dallas, Texas, for payment upon presentation of our invoices to said bank are accepted.' Thereupon the plaintiff arranged for resale of the coal and its shipment abroad. On April 1, 1947, the Dallas office wired the plaintiff that unless the sum of \$17,500 was deposited in the First National Bank in Dallas by noon April 4, 'the sale will be cancelled and other disposition made.' Though claiming that this demand was in the teeth of the contract, the plaintiff arranged for an irrevocable letter of credit payable through the First National Bank of Dallas to the War Assets Administration. The Dallas office now insisted that unless cash was deposited [337 U.S. 682, 707] 'the sale of 10,000 tons of coal * * * will be cancelled ten days from this date.' That office disregarded further endeavors by the plaintiff to adjust the matter, and on April 16 it informed the plaintiff that the contract was canceled. Having learned that the coal was to be sold to another concern, the plaintiff, asserting ownership in the coal and the threat of irreparable damage, brought this suit in the District Court of the United States for the District of Columbia to restrain the War Assets Administrator and those under his control from transferring the coal to any other person than the plaintiff. 1

After issuing a temporary restraining order the District Court on May 6, 1947, dismissed the suit with this oral [337 U.S. 682, 708] observation: 'I am satisfied that this suit is in effect a suit for specific performance and the United States is a necessary party, and this Court is without jurisdiction.' The Court of Appeals took a different view: 'Appellant, * * * did not seek the court's aid to interfere in the

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use of official discretion by the appellee. Such discretion was exercised at the time the contract with appellant was entered into. If that contract served to vest title immediately in appellant then it follows that the ruling in *Philadelphia Co. v. Stimson*, 223 U.S. 605, is controlling here. * * * Clearly, then, it was incumbent upon the lower court in determining its jurisdictional capacity to decide the ultimate question of whether or not a contract of sale had been consummated between appellant and appellee.' 165 F.2d 235, 237.

The conflict between the District Court and the Court of Appeals on these facts reflects fairly enough the seeming disharmony of the numerous opinions in which this Court has dealt with the claim of immunity of government from unconsented suit. As to the States, legal irresponsibility was written into the Constitution by the Eleventh Amendment; as to the United States, it is derived by implication. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 321, 747; see Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 *Harv.L.Rev.*, 1060, 1064-1065 (1946). The sources of the immunity are formally different but they present the same legal issues.

The subject is not free from casuistry. This is doubtless due to the fact that a steady change of opinion has gradually undermined unquestioned acceptance of the sovereign's freedom from ordinary legal responsibility. The vehement speed with which the Eleventh Amendment displaced the decision in *Chisholm v. Georgia*, 1793, 2 *Dall.* 419, proves how deeply rooted that doctrine was in the early days of the Republic. See *State of New Hampshire v. Louisiana*, 108 U.S. 76, 86-88, 179-181. In the course of a century or more a steadily expanding conception of public morality regarding 'governmental responsibility' has led to a 'generous policy of consent for suits against the government' to compensate for the negligence of its agents as well as to secure obedience to its contracts. *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 396, 521; see also Borchard's bibliography in 20 *A.B.A.J.* 747, and the materials in Judge Mack's opinion in the *Pesaro*, D.C., 277 F. 473, reversed, 271 U.S. 562.

The course of decisions concerning sovereign immunity is a good illustration of the conflicting considerations that often struggle for mastery in the judicial process, at least implicitly. In varying degrees, at different times, the momentum of the historic doctrine is arrested or deflected by an unexpressed feeling that governmental immunity runs counter to prevailing notions of reason and justice. Legal concepts are then found available to give effect to this feeling, and one of its results is the multitude of decisions in which this Court has refused to permit an agent of the government to claim that he is pro tanto the government and therefore sheltered by its immunity. Multitudinous as are these cases and the seeming inconsistencies among them, analysis reveals certain common considerations. The cases in which claim was made that a suit against one who holds public office is in fact a suit against the government fall into well defined categories. See the Appendix, post, 337 U.S. 729 to 732 to 1483. Though our opinions have not always been consciously directed toward this classification, it is supported not only by what was actually decided but also by much that is expressly said.

Our decisions fall under these heads:

- (1) Cases in which the plaintiff seeks an interest in property which concededly, even under the allegation of [337 U.S. 682, 710] the complaint, belongs to the government, or calls for an assertion of what is unquestionably official authority. 2
- (2) Cases in which action to the legal detriment of a plaintiff is taken by an official justifying his action under an unconstitutional statute. 3
- (3) Cases in which a plaintiff suffers a legal detriment through action of an officer who has exceeded

his statutory authority. 4

(4) Cases in which an officer seeks shelter behind statutory authority or some other sovereign command for the commission of a common-law tort. 5 [337 U.S. 682, 711] 1. The series of cases which come within the first category began with *Governor of Georgia v. Madrazo*, 1828, 1 Pet. 110. There a claim was made upon the Governor of Georgia, as Governor, for moneys in the treasury of the State and slaves in its possession. The Court in an opinion by Chief Justice Marshall held that the State was actually though not formally the defendant in the suit. This was a departure by Marshall from what he had said a few years earlier in *Osborn v. Bank of the United States*, 9 Wheat. 738, to the effect that the Eleventh Amendment is 'limited to those suits in which a State is a party on the record.' *Id.* 9 Wheat. at page 857. Such a formal test could not long survive experience, and it was explicitly laid to rest in *Re Ayers*, 123 U.S. 443, 487, et seq., 173.

The crucial question in this class of cases is when does a suit against one holding official office inevitably involve the exercise of powers that are his as a functionary of government. Marshall's decision in the case of the Governor of Georgia disposed of this question with his sententious characterization of the nature of the claim against the Governor: 'The demand made upon him, is not made personally, but officially.' *Governor of Georgia v. Madrazo*, supra, 1 Pet. 110, 123. But the answer is not [337 U.S. 682, 712] always as manifest as it was in that case, for the Governor was asked to surrender moneys actually in the State's treasury and property in its possession. The fact that a defendant has no personal connection with conduct for which redress is sought is an indication that he is being sued because his position empowers him to carry out the desired relief. On the other hand, the mere fact that his official capacity is ascribed to the agent against whom relief is sought is not conclusive that he is being sued as for his sovereign. See e.g., *Perkins v. Elg*, 307 U.S. 325.

The pervasive manifestations of modern government beget situations in which it is not always obvious whether the demand made upon an individual is, in Marshall's phraseology, 'not made personally, but officially.' Such an ambiguity as to the meaning of particular circumstances is a commonplace task for the judicial process. The governing principle is clear enough. If a defendant is asked to transfer the possession or title of property which is the Government's, judged by the conventional tests of possession or ownership, or if he is asked to exercise authority with which the State has invested him and the desired action is in fact governmental action so far as an individual is ever pro tanto the impersonal government, such demands are effectively demands upon the sovereign, which require the sovereign's consent as a prerequisite to the grant of judicial remedies.

2. To the second category belong the cases where an official asserts the authority of a statute for his action but the injured plaintiff challenges the constitutionality of the statute. Threatened injury will then be enjoined if the plaintiff otherwise satisfies the requirements for equitable intervention. *Allen v. Baltimore & O.R. Co.*, 114 U.S. 311, 5 S. Ct. 925; *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362; *Ex parte Young*, 209 U.S. 123, 13 L.R.A., N.S., 932, 14 Ann.Cas. 764; *Rickert Rice Mills Co. v. Fontenot*, 297 U.S. 110. So also recovery may be [337 U.S. 682, 713] had of property in an action against an official when the statute under which the seizure of the property was made is unconstitutional. *Poindexter v. Greenhow*, 114 U.S. 270. In these cases the suit against one holding office is deemed 'a suit against him personally, as a wrongdoer, and not against the state.' *Ex parte Young*, supra, 209 U.S. 123, 151, 450, 13 L.R.A., N.S., 932, 14 Ann. Cas. 764.

These cases likewise apply a principle that is clear. There is an appearance of inconsistency in some of the cases only because opinions also are prey to the frailties of composition. Familiar phrases are not always used with critical precision or with due relevance to the circumstances of a particular case.

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Specifically, there are instances where the unconstitutionality of a statute was conceded and yet the language of sovereign immunity was invoked to bar suit. See, e.g., *State of North Carolina v. Temple*, 134 U.S. 22; *Christian v. Atlantic & N.C.R. Co.*, 133 U.S. 233; *New York Guaranty & Indemnity Co. v. Steele*, 134 U.S. 230. These cases do not qualify the principle of the cases in category two. Regard for the facts of these cases brings them within the first category because the nature of the relief requested makes them either cases in which Government property would have to be transferred, or cases where the person sued could satisfy the court decree only by acting in an official capacity. The tortfeasor, that is, is not immunized because he happened to hold office, but because the tort cannot be redressed, or if threatened, averted, without bringing into operation governmental machinery.

Thus, even though a plaintiff's rights under a bond are unconstitutionally sought to be diminished, he cannot have his bond respected if to do so a court would have to order the levying and collecting of a tax. Only the State can exact taxes, and that sovereign function cannot be enforced without the State's consent by pretending [337 U.S. 682, 714] to sue a tax collector as an individual even though the individual sued had the duty, under the statute, to collect the tax. *State of North Carolina v. Temple*, 134 U.S. 22. Again, if title to property is in the Government, a suit to secure transfer of that property to the plaintiff will not lie against an official sued as an individual even though the State acquired title by way of an unconstitutional statute. *Cunningham v. Macon & Brunswick R. Co.*, 109 U.S. 446, 609; *Christian v. Atlantic & N.C.R. Co.*, 133 U.S. 233; see *Land v. Dollar*, 330 U.S. 731, 737-738, 1012. So, also, if the relief sought by an injured plaintiff would involve, in part at least, destruction of the Government's interest in property, that part of relief cannot be granted even though a tort committed by a governmental agent gave rise to the injury. *Belknap v. Schild*, 161 U.S. 10; *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 35 L.R.A., N.S., 243. To the extent that relief can be granted without affecting property rights of a State, not a consenting party to a controversy, an action is not barred. *Hopkins v. Clemson Agricultural College*, *supra*, 221 U.S. 636, 649, 659, 35 L.R.A., N.S., 243; see *International Postal Supply Co. v. Bruce*, 194 U.S. 601, 605-606, 821.

Since the cases to which reference has just been made usually involve State debts and money in a State treasury, they have served to sponsor the proposition that a suit will not be permitted where the relief sought would 'expend itself on the public treasury or domain, or interfere with the public administration.' *Land v. Dollar*, 330 U.S. 731, 738, 1012. This is a way of saying that a court cannot entertain an action, when the sovereign has not consented to be sued, if the judgment sought from the court would require an official to do that which he could only do by virtue of the fact that he is an official, that quod hoc, he is the State. But the statement quoted does not mean that the mere fact that a State's revenue is adversely affected, is conclusive of a court's jurisdiction [337 U.S. 682, 715] to entertain suit against one who happens to hold a public office. For example, in *Board of Liquidation v. McComb*, 92 U.S. 531, a bondholder was permitted to enjoin an issue of bonds which would have reduced the value of his holdings because the issue was authorized by a statute which offended the impairment-of-obligation clause. And see *Allen v. Baltimore & O.R. Co.*, 114 U.S. 311; *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, *Ann. Cas. 1913C, 1050*. And suits have lain to obtain public lands where the decree involved no discretion on the part of the individual whom the decree bound. *Santa Fe Pac. R. Co. v. Fall*, 259 U.S. 197; *Noble v. Union River Logging R. Co.*, 147 U.S. 165; *Payne v. Central Pac. R. Co.*, 255 U.S. 228.

The matter boils down to this. The federal courts are not barred from adjudicating a claim against a governmental agent who invokes statutory authority for his action if the constitutional power to give him such a claim of immunity is itself challenged. Sovereign immunity may, however, become relevant because the relief prayed for also entails interference with governmental property or brings the operation of governmental machinery into play. The Government then becomes an indispensable party and without its consent cannot be implicated. See Mr. Justice Brandeis in *Morrison v. Work*, 266 U.S. 481, 486-487, 151, 152.

It should also be noted that a cause of action which would, for one reason or another fail, if brought against a private agent, is not saved because it is brought against one holding public office purporting to act under an unconstitutional statute. The action may fail because there is no 'case' or 'controversy,'⁶ or because the plaintiff [337 U.S. 682 , 716] has not suffered invasion of a legally protected interest,⁷ or because the foundation for equitable relief is wanting,⁸ or because the particular defendant has committed no wrong.⁹ Such situations present no problem of sovereign immunity, but language pertaining to sovereign immunity sometimes creeps into opinions disposing of them.

3. Recovery has been sustained where, although the official acts under a valid statute, he actually exceeded the authority with which the statute had invested him. An action then lies against the agent because 'he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense, he must show that his authority was sufficient in law to protect him.' *Pennoyer v. McConnaughy*, 140 U.S. 1, 14, 703; *Scully v. Bird*, 209 U.S. 481 ; *Philadelphia Co. v. Stimson*, 223 U.S. 605 . Here also the traditional criteria for judicial action are prerequisite; see, e.g., *State of Louisiana v. McAdoo*, 234 U.S. 627 , if they are not satisfied the question of sovereign immunity does not emerge. And if the relief necessarily implicates a resort to State funds the State becomes an indispensable party and without its consent the suit must fail. See *State of Louisiana v. McAdoo*, supra; *Lankford v. Platte Iron Works*, 235 U.S. 461 .

4. The fourth category of cases brings us to the controversy immediately before the Court and demands detailed analysis. These are the cases, it will be recalled, in which an official seeks to screen himself behind the sovereign in a suit against him based on the commission [337 U.S. 682 , 717] of a common-law tort. See Appendix, Part II, C, post. A plaintiff's right 'under general law to recover possession of specific property wrongfully withheld' may be enforced against an official and he cannot plead the sovereign's immunity against the court's power to afford a remedy. *Land v. Dollar*, 330 U.S. 731, 736, 1011; *Belknap v. Schild*, 161 U.S. 10, 18-20, 445, 446; *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 643, 31 S. Ct. 654, 656, 35 L.R.A.,N.S., 243.

The starting point of this line of cases is, *United States v. Lee*, 106 U.S. 196 . Familiar as that case is, its controlling facts bear rehearsal. The Arlington estate of General Robert E. Lee was seized for nonpayment of taxes. These taxes had in fact been tendered by a friend, but the official had interpreted his authority as permitting payment of the taxes only by the record owner. After seizure, the United States established a fort and cemetery on the land. The plaintiff, in whom title to the Arlington estate vested if its seizure could not be justified, brought an action of ejectment against the governmental custodians of the estate. After the overruling of a suggestion by the Attorney General of the United States that the Circuit Court was without jurisdiction because the property was in possession of the United States, the action was sustained against the defendants since they could not justify their possession by proof of a valid title in the Government. This Court affirmed, holding that the lower court was competent to decide the issues between the parties without the need of impleading the Government whose consent was withheld.

While there was some talk in the Lee opinion, as well as in some of the cases which followed that decision, about taking property without compensation, the basis of the action was that the defendants were ordinary tortfeasors, not immunized for their wrongful invasion of the plaintiff's property by the fact that they claimed to have [337 U.S. 682 , 718] acted on behalf of the Government. ¹⁰ This group of cases is quite different from those in which the plaintiff claimed that the defendant, purporting to act in an official capacity, exceeded the authority which a statute conferred upon him, or that the statute under which he justified his action exceeded the power of the legislature to confer such authority. In this class of cases the governmental agent had valid statutory authority but he determined erroneously the

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condition which had to exist before he could exercise it. The basis of action in this class of cases is the defendant's personal responsibility for the commission of a tort, which makes it irrelevant that by waiving the case against the governmental agent the plaintiff might choose to sue the Government as for a contract. A detailed consideration of four recent cases should leave no doubt regarding the settled course and decision in conformity with this principle.

(a) In *Sloan Shipyards Corp. v. United States Fleet Corp.*, 258 U.S. 549, the controversy arose in connection with a contract between Sloan Shipyards and the Fleet Corporation, a Government corporation. A proviso in the contract authorized the United States to take over the plant and complete the contract on Sloan Shipyards' [337 U.S. 682, 719] failure to perform. Under a statute the United States could also condemn the land and the business, if that were deemed necessary for the successful conduct of the war. That would bring into play a right to compensation enforceable in the Court of Claims. The Fleet Corporation seized the plant, but it was not made manifest that the seizure of the plant was an exercise of the Government's power of condemnation. Sloan Shipyards brought suit for the return of the property. The lower courts treated this as a suit for compensation, pursuable as such against the Government, in the Court of Claims. This Court, speaking through Mr. Justice Holmes, reversed, took the bill on its face as one based on the wrongful acts of the Fleet Corporation and as such entertainable regardless of the fact that the conduct of the Fleet Corporation might also give rise to a claim for compensation against the Government. 11

This decision, which had thorough consideration here, would have to be overruled if the theory now proposed for this class of cases is to be accepted. The crux of the Court's opinion leaves no room for doubt: 'The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name. It is not impossible that the Fleet Corporation purported to act under the contract giving it the right to take [337 U.S. 682, 720] possession in certain events, but that the plaintiffs can show that the events have not occurred.' 258 U.S. 549, 567 -568, 388.

(b) So, too, *Goltra v. Weeks*, 271 U.S. 536, would have to go by the board if the theory now proposed were accepted. The Government had leased its barges for operation by the plaintiff. Following a seizure of some of the barges and a threat to seize the rest for alleged failure to comply with the lease terms, the plaintiff brought a bill against the Secretary of War and the Chief of Engineers to enjoin the threatened seizure and to secure restoration of the barges already seized. This Court found that it was error for the Court of Appeals to hold that the United States was a necessary party and to have dismissed the bill for that reason. The governing principle was thus formulated by Mr. Chief Justice Taft: 'The bill was suitably framed to secure the relief from an alleged conspiracy of the defendants without lawful right to take away from the plaintiff the boats of which by lease or charter he alleged that he had acquired the lawful possession and enjoyment for a term of five years. He was seeking equitable aid to avoid a threatened trespass upon that property by persons who were government officers. If it was a trespass, then the officers of the government should be restrained whether they professed to be acting for the government or not. Neither they nor the government which they represent could trespass upon the property of another, and it is well settled that they may be stayed in their unlawful proceeding by a court of competent jurisdiction, even though the United States for whom they may profess to act is not a party and can not be made one. By reason of their illegality, their acts or threatened acts are personal and derive no official justification from [337 U.S. 682, 721] their doing them in asserted agency for the government.' 271 U.S. 536, 544, 616.

(c) This line of cases, beginning with *United States v. Lee*, supra, 106 U.S. 196, was again followed in *Ickes v. Fox*, 300 U.S. 82. There a bill was sustained against the defendant, the Secretary of the

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Interior, based on the claim that compliance by the plaintiff with the terms of an agreement made with a predecessor Secretary of the Interior rendered the Secretary's action a trespass and as such enjoined, though the action was justified as a governmental prerogative. In reaching this result, the Court specifically referred to the principles formulated in *Goltra v. Weeks*, above quoted.

(d) Only the other day this Court decided *Land v. Dollar*, 330 U.S. 731. There is was ruled that a claim by the plaintiff for the recovery of the possession of property physically controlled by members of the United States Maritime Commission but alleged to have been wrongfully withheld was not inherently a suit against the Government and gave jurisdiction to the court 'to determine its jurisdiction by proceeding to a decision on the merits'-that is to determine whether the plaintiffs' claim that withholding of the pledged property was, under the circumstances, tortious and therefore subject to relief against the agents as individuals. 330 U.S. at page 739, 67 S.Ct. at page 1013. The Court once more applied the principle of *United States v. Lee*, supra, reinforced by reference to the cases that apply the Lee doctrine, including *Sloan Shipyards Corp. v. United States Fleet Corp.*, supra, *Goltra v. Weeks*, supra, and *Ickes v. Fox*, supra. It also pointed out that the fact that there existed a remedy in the Court of Claims against the Government was irrelevant. 330 U.S. at page 738, 67 S. Ct. at page 1012.

In each of these cases this Court sanctioned a suit against an officer of the Government merely because the officer misconceived the facts, or misapplied the legal [337 U.S. 682, 722] principles, on which rested the plaintiff's right 'under general law to recover possession of specific property wrongfully withheld.' *Land v. Dollar*, supra, 330 U.S. at page 736, 67 S.Ct. at page 1011. Under such circumstances an officer acquires no immunity even though he committed a tort while attempting to discharge what would be his duty if he were correct on his assumption as to the ownership of the property or as to the right to its possession under the legal instruments governing the transaction. See *Holmes, J.*, in *Miller v. Horton*, 152 Mass. 540, 26 N. E. 100, 10 L.R.A. 116, 23 Am.St.Rep. 850; *Belknap v. Schild*, 161 U.S. 10, 18 - 19, 445, 446; *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 643 -645, 656, 657, 35 L.R.A.,N.S., 243; *Sloan Shipyards Corp. v. United States Fleet Corp.*, 258 U.S. 549, 567, 388. In this class of cases the officer can escape liability only if 'special remedies have been provided by statute that displace those th t otherwise would be at the plaintiff's command.' *Sloan Shipyards Corp. v. United States Fleet Corp.*, supra, 258 U.S. at page 567, 42 S.Ct. at page 388. When there is such a special remedy the suit against the officer is barred not because he enjoys the immunity of the sovereign but because the sovereign can constitutionally change the traditional rules of liability for the tort of the agent by providing a fair substitute. *Crozier v. Fried Krupp Aktiengesellschaft*, 224 U.S. 290 56 L.Ed. 771; *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331. But the general statute permitting suit in the Court of Claims in certain instances against the Government is not a statute that provides that remedies otherwise at the plaintiff's command are to be displaced. 12 A holding that the avail- [337 U.S. 682, 723] ability of an action for monetary damages in the Court of Claims against the United States prevents a suit at law, or, if the necessary requisites for equity jurisdiction are present, in equity, against the governmental agent, would be as novel as it is indefensible in the light of the settled course of decisions. Indeed, this argument is not novel; it has been explicitly negated in at least two cases. See *Sloan Shipyards Corp. v. United States Fleet Corp.*, 258 U.S. 549, 567, 568, 388; *Land v. Dollar*, 330 U.S. 731, 738, 1012.

'Sovereign immunity' carries an august sound. But very recently we recognized that the doctrine is in 'disfavor.' *Federal Housing Administration v. Burr*, 309 U.S. 242, 245, 490. 13 It ought not to be extended by discredit- [337 U.S. 682, 724] ing a long line of decisions. No considerations of policy warrant the overruling of *United States v. Lee*, supra, and th cases which have applied it in giving a remedy for wrongdoing without harm to any public interest that deserves protection. To overrule the Lee case would at least have the merit of candor. To attempt to explain it on the ground that the Government itself was not suable for the wrongdoing at the time of the Lee decision is to invent a new theory to explain away a decision which has held its ground for nearly

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seventy years.

This liability for torts committed by defendants even though they conceive themselves to be acting as officials and for the public good, rests ultimately on the conviction that the policy behind the immunity of the sovereign from suit without its consent does not call for disregard of a citizen's right to pursue an agent of the government for a wrongful invasion of a recognized legal right unless the legislature deems it appropriate to displace the right of suing the individual defendant with the right to sue the Government. The fact that the governmental agent cannot claim the immunity of the sovereign of course does not apell liability, under all circumstances, for the discharge of what he conceived to be his duty. See, e.g., *Seavey v. Preble*, 64 Me. 120; *Fields v. Stokley*, 99 Pa. 306, 44 Am.Rep. 109; the conflicting considerations are presented in *Miller v. Horton*, 152 Mass. 540, 26 N.E. 100, 10 L.R.A. 116, 23 Am.St. Rep. 850. Similarly, equitable considerations bearing on the propriety of granting [337 U.S. 682 , 725] the extraordinary remedy of an injunction may here come into play as is true whenever a private claim cuts across the public interest. 14 But these are matters wholly beside the issue of sovereign immunity.

Of course where the United States is the owner in possession of property a court cannot interfere without the Government's consent. But if it is to be denied that a court cannot decide the question, when properly presented, whether property held by an official belongs to the plaintiff, *Goltra v. Weeks*, *Sloan Shipyards Corp. v. United States*, *Ickes v. Fox*, *Land v. Dollar*, and the other cases cited in Part II, C of the Appendix, post, 337 U.S. 732., 69 S.Ct. p. 1483, must be overruled.

Only the other day we said: 'Where the right to possession or enjoyment of property under general law is in issue, and the defendants claim as officers or agents of the sovereign, the rule of *United States v. Lee*, supra, has been repeatedly approved. * * * In *United States v. Lee*, supra, record title of the land was in the United States and its officers were in possession. The force of the decree in that case was to grant possession to the private claimant. Though the judgment was not res judicata against the United States, * * * it settled as between the parties the controversy over possession. [337 U.S. 682 , 726] Precisely the same will be true here, if we assume the allegations of the complaint are proved.' *Land v. Dollar*, supra, 330 U.S. at page 737, 67 S. Ct. at page 1012.

When a pleading raises a substantial claim that the defendant is wrongfully withholding from the plaintiff property belonging to him, the defendant has not heretofore been permitted to shield himself behind the immunity of the sovereign. Only after the preliminary question of ownership is decided against the plaintiff does the claim of sovereign immunity come into play. Only then can it be said that the decree will affect property of the sovereign.

The Court tries to explain away *Land v. Dollar*, supra, by suggesting that it was a case where the officers acted in excess of their authority although the opinion in that case makes clear that even if the officers had authority there still remained the issue whether the shares of stock were sold or pledged to the United States. If the latter, to hold after satisfaction of the pledge would be tortious, and the stock could be recovered in the suit against the defendants. The Court seeks to avoid the decision in *Ickes v. Fox*, supra, by saying that the ground of decision is not made clear. But not even these most dubious arguments can explain away *Goltra v. Weeks*, 271 U.S. 536. Accordingly, the Court impliedly overrules that decision. No reason of policy is vouchsafed for overruling a decision that carries the authority that the *Goltra* case does. It was based on a long series of prior cases, it was decided by a unanimous Court and delivered by a Chief Justice who brought to the Court from his Presidential experience a partiality toward freedom for executive action, as evinced by his opinion in the contemporaneous case of *Myers v. United States*, 272 U.S. 52. The *Goltra* case has since been frequently, and always approvingly, cited, most recently in *Land v. Dollar*, supra, as an application of

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the Lee doctrine. See also *Ickes v. Fox*, [337 U.S. 682, 727] 300 U.S. 82, 97, 417. The Goltra case is now thrown into the discard because it did not cite *Goldberg v. Daniels*, 231 U.S. 218. That earlier case is deemed in conflict with the later Goltra decision and therefore the later case, so we are told, must yield to the earlier case. One would suppose that the failure of a full-dress opinion in a later case, which was thoroughly argued and not hastily decided, to cite an earlier opinion would not be attributed either to the Court's unawareness of the earlier opinion or its silent overruling of it. That the Court could not have been unaware of the decision in the Goldberg case is incontestably proved by the fact that it was referred to in the briefs in the Goltra case. That there was not obvious inconsistency between the two decisions is indicated by the fact that Mr. Justice Holmes, who wrote the Goldberg opinion joined in the Goltra opinion. It is too much to assume that there was concerted silence about the Goldberg decision by the Court in Goltra.

A more obvious explanation lies on the surface. Goldberg was not cited in Goltra for the conclusive reason that Goldberg had nothing to do with Goltra. In the Goldberg case the Court, on the basis of the pleadings before it, was dealing with a suit where 'the United States is the owner, in possession of the vessel.' 231 U.S. 218, 221-222. Accordingly, the suit was not for a tortious withholding of the plaintiff's property and the Government's immunity barred suit. In Goltra, on the contrary, the claim was for the delivery of property alleged to belong to the plaintiff and tortiously in possession of the individual defendants, and the Court held that the plaintiff is entitled to establish such a claim as he can, 'even though the United States for whom they (the defendants) may profess to act is not a party and can not be made one.' 271 U.S. at page 544, 46 S.Ct. at page 616. That is this case.

As is true of the present case, the right of control over property may depend on compliance with the terms of a [337 U.S. 682, 728] contract. The fact of compliance may rest, certainly in the first instance, in the judgment of a particular official. But that would not authorize him to rescind a valid contract if there had been full compliance. Of course, even that power may be conferred by agreement or by statute. But in the absence of such an agreement, or such a provision in a statute, a plaintiff may have redress against a defendant who has wrongfully rescinded a valid contract fully performed if a property right of the plaintiff is thereby tortiously affected. He may also have his day in court if he denies the right of an official to determine definitively want of compliance, when the issue of compliance is decisive of the defendant's alleged wrongdoing. These are precisely the issues tendered by this complaint. It is no answer at this stage of the case, to say that it was in fact within the agent's authority to do what he did. If a valid statute gives him power to withhold property which belongs to another, or if he has the power to re-vest title in the Government after a valid contract has vested it in another then of course he is free from liability. But these are matters that go to the merits. The very purpose of this suit is to determine whether what the governmental agent did here was within his power. To decide whether the 'authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question.' *United States v. Lee*, 106 U.S. 196, 219, 259. The issues outlined above are issues which may be contested against a defendant, even though he hold office. *Noble v. Union River Logging R. Co.*, 147 U.S. 165; *Payne v. Central Pacific R. Co.*, 255 U.S. 228; *Santa Fe Pacific R. Co. v. Fall*, 259 U.S. 197; *Land v. Dollar*, 330 U.S. 731.

The District Court therefore had jurisdiction over the controversy because only after a consideration of the [337 U.S. 682, 729] merits of the respondent's claim could it be determined whether the decree would affect Government property. Since that court has jurisdiction it can also determine whether a cause of action was stated and whether there are any considerations which would cause a court of equity not to grant the relief requested.

I would affirm the judgment of the Court of Appeals.

Appendix.

Cases since *Osborn v. Bank of the United States*, 1824, 9 Wheat. 738, concerning suits against governmental agents in which defense of sovereign immunity was raised.

I. Cases in which jurisdiction was found wanting.

A. Plaintiff sought interest in property which concededly belonged to the Government, or demanded relief calling for an assertion of what was unquestionably official authority.

Governor of Georgia v. Madrazo, 1828, 1 Pet. 110; *State of Louisiana v. Jumel*, 107 U.S. 711; *Cunningham v. Macon & Brunswick R. Co.*, 109 U.S. 446; *Hagood v. Southern R. Co.*, 117 U.S. 52; *Christian v. Atlantic & N.C.R. Co.*, 133 U.S. 233; *State v. North Carolina v. Temple*, 134 U.S. 22; *New York Guaranty & Indemnity Co. v. Steele*, 134 U.S. 230; *Belknap v. Schild*, 161 U.S. 10; *State of Oregon v. Hitchcock*, 202 U.S. 60; *State of Louisiana v. Garfield*, 211 U.S. 70; *Murray v. Wilson*, 213 U.S. 151; *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 35 L.R.A., N.S., 243; *Goldberg v. Daniels*, 231 U.S. 218; *State of Louisiana v. McAdoo*, 234 U.S. 627; *Lankford v. Platte Iron Works*, 235 U.S. 461; *Wells v. Roper*, 246 U.S. 335; *Morrison v. Work*, 266 U.S. 481; *State of Minnesota v. United States*, 305 U.S. 382. [337 U.S. 682, 730] B. Decisions couched in terms of sovereign immunity or later so interpreted but which actually turned on other considerations.

1. No legally protected interest of the plaintiff was affected.

State of Louisiana v. McAdoo, 234 U.S. 627; *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118.

2. The particular defendant was unrelated to the plaintiff's claim because he was not threatening plaintiff's interest.

In re Ayers, 123 U.S. 443; *Fitts v. McGhee*, 172 U.S. 516; *Worcester County Trust Co. v. Riley*, 302 U.S. 292; *Mine Safety Appliance Co. v. Forrester*, 326 U.S. 371 (alternative reason).

3. Nature of the adjudication required presence of the sovereign as a necessary party.

Christian v. Atlantic & North Carolina R. Co., 133 U.S. 233; *Stanley v. Schwalby*, 162 U.S. 255; *State of New Mexico v. Lane*, 243 U.S. 52.

4. Case dismissed for want of ordinary requirements of equity jurisdiction.

Hawks v. Hamill, 288 U.S. 52; *Morrison v. Work*, 266 U.S. 481 (alternative ground).

C. Cases in which legislation specifically provided that only the sovereign itself could be sued for action authorized by statute.

Crozier v. Fried Krupp Aktiengesellschaft, 224 U.S. 290; *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331.

D. Cases in which the plaintiff pursued a statutory procedure indicating consent to suit against the sovereign and is therefore bound by its limitations. [337 U.S. 682, 731] *Smith v. Reeves*, 178 U.S. 436; *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47; *Ford Motor Co. v. Department of Treasury of*

Indiana, 323 U.S. 459; Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573.

II. Cases in which jurisdiction was entertained.

A. Cases in which an official justified his action under an unconstitutional statute.

Osborn v. Bank of the United States, 1824, 9 Wheat, 738; Board of Liquidation v. McComb, 92 U.S. 531; Poindexter v. Greenhow, 114 U.S. 270; White v. Greenhow, 114 U.S. 307; Chaffin v. Taylor, 114 U.S. 309, 5 S. Ct. 924; Allen v. Baltimore & O.R. Co., 114 U.S. 311; Pennoyer v. McConaughy, 140 U.S. 1; Ex parte Tyler, 149 U.S. 164; Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362; Scott v. Donald, 165 U.S. 58; Scott v. Donald, 165 U.S. 107; Smyth v. Ames, 169 U.S. 466; Prout v. Starr, 188 U.S. 537; Mississippi R. Co. v. Illinois C.R. Co., 203 U.S. 335; Ex parte Young, 209 U.S. 123, 13 L.R.A., N.S., 932, 14 Ann.Cas. 764; General Oil Co. v. Crain, 209 U.S. 211; Ludwig v. Western Union Telegraph Co., 216 U.S. 146; Western Unio Telegraph Co. v. Andrews, 216 U.S. 165; Herndon v. Chicago, R.I. & Pac. R. Co., 218 U.S. 135; Truax v. Raich, 239 U.S. 33, L.R.A.1916D, 545, Ann.Cas.1917B, 283; Tanner v. Little, 240 U.S. 369; Greene v. Louisville & I.R. Co., 244 U.S. 499, Ann.Cas. 1917E, 88; Public Service Co. v. Corboy, 250 U.S. 153; Sterling v. Constantin, 287 U.S. 378; Rickert Rice Mills Co. v. Fontenot, 297 U.S. 110.

B. Cases in which an officer exceeded his statutory authority.

Rolston v. Missouri Fund Commissioners, 120 U.S. 390; Scully v. Bird, 209 U.S. 481; Atchison, T. & S.F.R. Co. v. O'Connor, 223 U.S. 280, Ann.Cas.1913C, 1050; Philadelphia Co. v. [337 U.S. 682, 732] Stimson, 223 U.S. 605; Waite v. Macy, 246 U.S. 606; Payne v. Central Pac R. Co., 255 U.S. 228; Santa Fe Fac. R. Co. v. Fall, 259 U.S. 197; Work v. State of Louisiana, 269 U.S. 250.

C. Cases in which an officer sought shelter behind statutory authority or some other sovereign command for the commission of a common-law tort.

1. Cases in which an officer was not relieved S.Ct. 418, 259; Scranton v. Wheeler, was acting for the sovereign.

Stanley v. Schwalby, 147 U.S. 508; Scranton v. Wheeler, 179 U.S. 141; Sloan Shipyards Corp. v. United States Fleet Corp., 258 U.S. 549; Goltra v. Weeks, 271 U.S. 536; Ickes v. Fox, 300 U.S. 82; Land v. Dollar, 330 U.S. 731.

2. Cases in which an officer was held liable for a common-law tort, but the opinion made reference to a situation involving an unconstitutional taking.

United States v. Lee, 106 U.S. 196; Noble v. Union River Logging R. Co., 147 U.S. 165; State of South Carolina v. Wesley, 155 U.S. 542; Tindal v. Wesley, 167 U.S. 204; Hopkins v. Clemson Agricultural College, 221 U.S. 636, 35 L.R.A., N.S., 243.

Footnotes

[Footnote 1] Littlejohn resigned on November 28, 1947. On April 19, 1948, we granted the Government's motion to substitute his successor, Jess Larson, as petitioner here.

[Footnote 2] Domestic & Foreign Commerce Corp. v. Littlejohn, 1947, 83 U.S.App.D. C. 13, 165 F.2d 235.

[Footnote 3] The judgment of the Court of Appeals was not a final one, but we considered it appropriate for review here since, in our view, the jurisdictional issue was 'fundamental to the further conduct of the case.' See *Land v. Dollar*, 1947, 330 U.S. 731, 734, 1010.

[Footnote 4] Cf. *Sloan Shipyards v. United States Fleet Corp.*, 1922, 258 U.S. 549, where the question was whether a corporate agency of the United States could be sued where it, not the United States, was the contractor.

[Footnote 5] For this reason, there obviously was no objection to the substitution in this Court of the present Administrator for his predecessor, although all the actions complained of in the complaint were taken during the predecessor's administration.

[Footnote 6] In *re Ayers*, 1887, 123 U.S. 443. As was said in *State of Minnesota v. Hitchcock*, 1902, 185 U.S. 373, 387, 656: '* * * whether a suit is one against a state is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered * * *.'

[Footnote 7] There are, of course, limitations on the right to recover damages from public officers. See *Gibson v. Reynolds*, 8 Cir., 1949, 172 F.2d 95; *Glass v. Ickes*, 1940, 73 App.D.C. 3, 117 F.2d 273, 132 A.L.R. 1328; *Harper*, *Torts* (1933) 298. These limitations are matters of substantive law, applicable in suits indubitably addressed to the officer, not the sovereign. They are not necessarily coincidental with the limitations on the court's jurisdiction to hear a suit directed against the sovereign. See *Jennings*, *Tort Liability of Administrative Officers*, 21 *Minn.L.Rev.* 263 (1937), and note the differing treatment accorded the claim for compensation and the claim for specific relief in *Belknap v. Schild*, 1896, 161 U.S. 10, 27, 449.

[Footnote 8] Whether such relief is obtainable from any Government officer on the basis of the facts set out in the complaint is, as stated, not the question here. But it may seriously be doubted whether damages could, in any event, be recovered from Jess Larson, the present War Assets Administrator or from his predecessor, Robert M. Littejohn. The complaint did not charge them with any personal wrongdoing nor even with knowledge of the alleged wrongdoing of their subordinates. Cf. *Robertson v. Sichel*, 1888, 127 U.S. 507, 515 Å516, 1290. Since the complaint did not ask for damages but for specific relief the Administrator, in his official capacity, was of course, a proper party. Cf. *Williams v. Fanning*, 1947, 332 U.S. 490.

[Footnote 9] The complaint also asked for declaratory relief even more clearly directed at the sovereign. It was asked that the court declare that 'the sale of this coal * * * is still valid and in effect.' The Administrator, an agent for a disclosed principal, was not a party to the contract of sale. See 2 *Restatement, Agency* (1933) 320. The request for an adjudication of the validity of the sale was thus, even in form, a request for an adjudication against the sovereign. Such a declaration of the rights of the respondent vis-a-vis the United States would clearly have been beyond the court's jurisdiction. See *Stanley v. Schwalby*, 1896, 162 U.S. 255. We do not rest our conclusion here on the request for such a declaration, since the district court could have granted only the injunctive relief requested.

[Footnote 10] *Land v. Dollar*, 1947, 330 U.S. 731, 739, 1013. Since jurisdiction in this type of case does rest on the decision on the merits there can be no question that dismissal of a suit in which 'the alleged claim under the Constitution or federal statutes clearly appears to be * * * made solely for the purpose of obtaining jurisdiction or * * * is wholly insubstantial and frivolous' would be dismissal for lack of jurisdiction. See *Bell v. Hood*, 1946, 327 U.S. 678, 682Å683, 776.

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[Footnote 11] Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. *North Carolina v. Temple*, 1890, 134 U.S. 22.

[Footnote 12] This case must, therefore, be clearly distinguished from cases like *Noble v. Union River Logging R. Co.*, 1893, 147 U.S. 165. In that case, it was held that the officer being sued lacked power to refuse delivery because, under the statutory scheme, his predecessor's determination that the plaintiff was entitled to delivery was binding. A similar case would be presented here if the statute expressly provided that the Administrator's interpretations of contracts should be binding and irrevocable and if a later, or subordinate, official refused to follow a prior, binding interpretation. In such a case the issue would not be the correctness or incorrectness of the later decision under general law but simply the power of the official, under the statute, to make a decision at all. Cf. *Ickes v. Fox*, 1937, 300 U.S. 82.

[Footnote 13] *Perkins v. Lukens Steel Co.*, 1940, 310 U.S. 113, 125, 875.

[Footnote 14] *Tennessee Electric Power Co. v. T.V.A.*, 1939, 306 U.S. 118, 137, 139, 369, 370; *Mine Safety Co. v. Forrestal*, 1945, 326 U.S. 371.

[Footnote 15] Thus the Court said in *Hopkins v. Clemson College*, 1911, 221 U.S. 636, 643, 656, 35 L.R.A., N.S., 243, '* * * neither a state nor an individual can confer upon an agent authority to commit a tort, so as to excuse the perpetrator.' (Emphasis added.) See also 2 *Mechem, Agency* (2d Ed., 1914) 1077.

[Footnote 16] See *Philadelphia, Wilmington & Baltimore R. Co. v. Quigley*, 1859, 21 How. 202, 209; *Fletcher, Cyclopaedia Corporations*, 1931, 4877. The contention of the respondent in the present case is remarkably similar to that made, as regards corporate agents, in *Chestnut Hill & Spring House Turnpike Co. v. Rutter*, Pa. 1818, 4 Serg. & R. 6, 8 Am. Dec. 675. The argument is reported as follows, *id.* at page 9 of 4 Serg. & R.: 'Now, a corporation never was and never can be authorized by law to commit a tort; they can invest no one with power for that purpose. If, therefore, an agent constituted for a legal purpose, inflict an injury, the corporation is no more answerable, than it would be for an act of that agent, done without any authority whatever derived from it, because being unauthorised to commit a wrong, it is out of the scope of its corporate powers.'

The argumen was rejected by the Court. See also *Thayer v. Boston, Mass.*, 1836, 19 Pick. 511, 515, 31 Am. Dec. 157.

[Footnote 17] The Lee case was decided in 1882. At that time there celarly was no remedy available by which he could have obtained compensation for the taking of his land. Whether compensation could be obtained today in such a case is, of course, not the issue here.

[Footnote 18] For this reason the availability of a remedy in the Court of Claims may, in some cases, be relevant to the question of sovereign immunity. Where the action against which specific relief is sought is a taking, or holding, of the plaintiffs' property, the availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment. Compare *Hurley v. Kincaid*, 1932, 285 U.S. 95.

[Footnote 19] *Cunningha v. Macon & Brunswick R. Co.*, 1883, 109 U.S. 446, 451, 296, 609. The ensuing years have not made the task less difficult. See *Brooks v. Dewar*, 1941, 313 U.S. 354, 359,

981; *Land v. Dollar*, 1947, 330 U.S. 731, 738., 1012.

[Footnote 20] Thus, in *Tindal v. Wesley*, 1897, 167 U.S. 204, 222., 777, the Court stated that a suit to recover the Court stated that a suit to recover possession of property owned by the plaintiff and withheld by officers of a State was analogous to a suit to enjoin the officers from enforcing an unconstitutional statute. Any other view, the Court said, would lead to the result 'that if a state, by its officers * * * should seize for public use the property of a citizen, without making or securing just compensation for him, and thus violate the constitutional provision declaring that no state shall deprive any person of property without due process of law * * * the citizen is remediless so long as the state, by its agents, chooses to hold his property * * *.'

And in *Scranton v. Wheeler*, 1900, 179 U.S. 141, 152 Ä153, 52, 53, the Court said that the state court

'was under a duty to inquire whether the defendant had or could have any authority in law to do what he had done; and the suit was not to be deemed one against the United States because in the consideration of that question it would become necessary to ascertain whether the defendant could constitutionally acquire from the United States authority to obstruct the plaintiff's access * * * without making or securing compensation to him. * * *'

'The vital question, therefore, is * * * whether the prohibition in the Constitution of the United States, of the taking of private property for public use without just compensation, has any application to the case * * *.'

[Footnote 21] See, e.g., *Payne v. Central Pacific R. Co.*, 1921, 255 U.S. 228, 238., 317, where the Court said that specific relief could be had because the Government officers had 'departed from a plain official duty,' 'through a mistaken conception of their authority,' and *Santa Fe Pac. R. Co. v. Fall*, 1922, 259 U.S. 197, 199., 467, where the contention was 'that the Secretary went beyond the powers conferred upon him by the statute.' The cases are myriad and it is unnecessary to review them here.

[Footnote 22] *Poindexter v. Greenhow*, 1884, 114 U.S. 270, 288., 912, 962, 207; *Philadelphia Co. v. Stimson*, supra, 223 U.S. 605. Although stated in reference to a suit for damages, the rule of the Lee line of cases was thus summed up by Mr. Justice Hughes, in *Yearsley v. W. A. Ross Constr. Co.*, 1940, 309 U.S. 18, 21., 414: 'Where an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred.' (Emphasis added.)

[Footnote 23] The Court in the *Stimson* case said, 223 U.S. at page 622, 32 S.Ct. at page 345: 'While the complainant's title lay at the foundation of the suit, and it would be necessary for the complainant to prove it, if denied, still, if its title to the land under water were established or admitted to be as alleged, the question would remain whether the defendant, in imposing restrictions upon the use of the property, was acting by virtue of authority validly conferred by a general act of Congress. This was the principal question which the complainant sought to have determined.'

[Footnote 24] The reasoning of the *Goltra* case is also contradicted by the conclusion reached by the Court in the converse caseÄwhere a suit is brought against the United States, in which it is claimed that the tortious actions of public officers, within the scope of their delegated powers, are the actions of the United States and give rise to a cause of action against it for breach of an implied contract. *Portsmouth Co. v. United States*, 1922, 260 U.S. 327., demonstrates that such suits cannot be defeated by arguing that the officers' actions, because tortious, are outside of their authority and hence not actions of the United States. Cf. *Hooe v. United States*, 1910, 218 U.S. 322 (specific limitation on the agent's

authority). See also *United States v. Causby*, 1946, 328 U.S. 256, 267., 1068.

[Footnote 25] Whether the actual decision in the *Goltra* case, on the basis of the facts there presented, was correct or not is not relevant to the disposition of the present case, and we express no opinion on that question. *Goltra*, unlike *Goldberg*, does not present a parallel to the facts in the case at bar. The action complained of there was a seizure with a strong hand which was claimed to be unconstitutional, as an arbitrary taking of property without due process of law. Indeed, the District Court took jurisdiction on the theory that the case before it, like the *Lee* case, was a case of unconstitutional action. There is no such claim in the present case.

[Footnote 26] In addition to *Goltra v. Weeks*, *supra*, three other cases are argued to be inconsistent with this principle: *Sloan Shipyards v. United States Fleet Corp.*, 1922, 258 U.S. 549 ; *Land v. Dollar*, 1947, 330 U.S. 731 , and *Ickes v. Fox*, 1937, 300 U.S. 82 , 57 S. t. 412.

The *Sloan Shipyards* case is entirely inapposite. The suit there was against a corporate agency of the United States which had not acted in the name of the United States but in its own corporate name and right. The Court held only that the fact of agency did not immunize the agent from liability on its own contracts.

In *Land v. Dollar*, where the plaintiffs alleged that they were entitled to stock held by the Maritime Commission because the stock was received by the Commission only as a pledge, it was contended that any other kind of acquisition would constitute a violation of 207 of the Merchant Marine Act, 46 U.S.C.A. 1117, which allegedly gave the Commission authority to acquire stock only as collateral. The complaint therefore alleged that the members of the Commission 'acted in excess of their authority as public officers.' 330 U.S. at page 738, 67 S.Ct. at page 1013.

The ground for decision in *Ickes v. Fox* is not altogether clear. The argument was made in that case that the Secretary of the Interior had no statutory power to overrule a determination of the rights of the plaintiffs made by his predecessor in office. 300 U.S. at page 86, 57 S.Ct. at pages 413, 417. The tortious injury to the plaintiffs was also argued, in reliance on *Goltra v. Weeks*, as a basis for avoiding the sovereign's immunity. The Court appears to have relied on both grounds without indicating which was controlling. It said: 'The suits * * * are brought to enjoin the Secretary of the Interior from enforcing an order, the wrongful effect of which will be to deprive respondents of vested property rights not only acquired under Congressional acts, state laws and government contracts, but settled and determined by his predecessors in office' (emphasis added). In support of the conclusion that the suit could be maintained, the Court relied first on *Noble v. Union Logging R. Co.*, 1893, 147 U.S. 165 , a decision resting entirely on the officer's lack of statutory power to overrule the decision of his predecessor.

[Footnote 27] There could not be since the respondent admittedly has a remedy, in a suit for breach of contract, in the Court of Claims. Such a suit, indeed, would be based on the theory that the action of the Administrator in refusing to deliver was the action of the United States and thus created a cause of action against it for breach of contract. Only if the Administrator's action was within his authority could such a suit be maintained. *Hooe v. United States*, 1910, 218 U.S. 322 . It has never been suggested that a suit in the Court of Claims for breach of an express contract could be defeated because the action of the officer in breaching it constituted a tort and was therefore 'unauthorized.'

[Footnote 28] See *Brooks v. United States*, 1949, 337 U.S. 49 .

[Footnote 29] *Decatur v. Paulding*, 1840, 14 Pet. 497, 516.

[Footnote 1] The prayer for relief in the complaint is as follows:

'(1) That this court issue its temporary restraining order against the defendant, his agents, assistants, deputies, and employees and all persons acting or assuming to act under their direction, enjoining and restraining them from:

'(a) Carrying into effect the purported illegal and unauthorized cancellation of the sale to the plaintiff of this coal.

'(b) Reselling or attempting to resell this coal to any other person whatsoever than the plaintiff, the legal owner thereof.

'(c) Delivering any or all of this coal to any other person.

'(2) That upon hearing of motion for a preliminary injunction that this Court continue the temporary restraining order as a preliminary injunction.

'(3) That upon final hearing this Court make permanent the preliminary injunction.

'(4) That upon hearing of this cause the Court decrees that:

'(a) The sale of this coal to the plaintiff by letter of War Assets Administration, dated March 19, 1947, is still valid and in effect.

'(b) That the purported sale to the Midland Coal Company is illegal, because title to this coal is in the plaintiff.

'(c) That, in view of the delay and disruption of arrangements caused by the purported cancellation, plaintiff shall have thirty days from the date of this Court's final order in which to give shipping instructions.

'(d) That the plaintiff may have such other further and different relief as may to the Court seem proper and just in the premises.'

[Footnote 2] E.g., *Governor of Georgia v. Madrazo*, 1828, 1 Pet. 110; *State of Louisiana v. Jumel*, 107 U.S. 711 ; *Cunningham v. Macon & Brumswick R. Co.*, 109 U.S. 446 ; *Hagood v. Southern R. Co.*, 117 U.S. 52 ; *Christian v. Atlantic & North Carolina R. Co.*, 133 U.S. 233 ; *State of North Carolina v. Temple*, 134 U.S. 22 ; *New York Guaranty & Indemnity Co. v. Steele*, 134 U.S. 230 ; *Belknap v. Schild*, 161 U.S. 10 ; *State of Oregon v. Hitchcock*, 202 U.S. 60 ; *Murray v. Wilson Distilling Co.*, 213 U.S. 151 ; *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 35 L.R.A., N.S., 243; *State of Louisiana v. McAdoo*, 234 U.S. 627 ; *Lankford v. Platte Iron Works*, 235 U.S. 461 ; *Wells v. Roper*, 246 U.S. 335, 38 S. Ct. 317; *Morrison v. Work*, 266 U.S. 481 ; see *Land v. Dollar*, 330 U.S. 731 , 737Å738, 1012.

[Footnote 3] E.g., *Osborn v. Bank of the United States*, 1824, 9 Wheat. 738; *Board of Liquidation v. McComb*, 92 U.S. 531 ; *Poindexter v. Greenhow*, 114 U.S. 270 ; *White v. Greenhow*, 114 U.S. 307 ; *Chaffin v. Taylor*, 114 U.S. 309, 29 L.Ed 198; *Allen v. Baltimore & O.R. Co.*, 114 U.S. 311 ; *Pennoyer v. McConnaughy*, 140 U.S. 1, 11 S. Ct. 699; *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362 ; *Smyth v. Ames*, 169 U.S. 466 ; *Mississippi R. Co. v. Illinois C.R. Co.*, 203 U.S. 335, 27 S. Ct. 90; *Ex parte Young*, 209 U.S. 123, 13 L.R.A., N.S., 932, 14 Ann.Cas. 764; *Rickert Rice Mills Co. v. Fontenot*,

297 U.S. 110.

[Footnote 4] E.g., Scully v. Bird, 209 U.S. 481; Atchison, T. & S.F.R. Co. v. O'Connor, 223 U.S. 280, Ann.Cas. 1913C, 1050; Philadelphia Co. v. Stimson, 223 U.S. 605, 32 S. Ct. 340; Waite v. Macy, 246 U.S. 606; Santa Fe Pac. R. Co. v. Fall, 259 U.S. 197; Work v. Louisiana, 269 U.S. 250.

[Footnote 5] E.g., United States v. Lee, 106 U.S. 196; State of South Carolina v. Wesley, 155 U.S. 542; Tindal v. Wesley, 167 U.S. 204; Hopkins v. Clemson Agricultural College, 221 U.S. 636, 35 L.R.A.,N.S., 243;

Sloan Shipyards Corp. v. United States Fleet Corp., 258 U.S. 549; Goltra v. Weeks, 271 U.S. 536; Ickes v. Fox, 300 U.S. 82; Land v. Dollar, 330 U.S. 731. In four cases before the Lee case suit was permitted against the governmental agent for trespass to property under the claim that it was owned by the government without any discussion that a question of sovereign immunity might be involved. Meigs v. M'Clung's Lessee, 1815, 9 Cranch 11; Wilcox v. Jackson, 1839, 13 Pet. 498; Brown v. Huger, U.S. 1858, 21 How. 305; Grisar v. McDowell, U.S.1867, 6 Wall. 363, 18 L Ed. 863. And where the sovereign immunity argument was raised it was dismissed with 'it certainly can never be alleged, that a mere suggestion of title in a state to property, in the possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title.' United States v. Peters, U.S.1809, 5 Cranch 115, 139A40; see also The Davis, 1869, 10 Wall. 15.

[Footnote 6] See Fitts v. McGhee, 172 U.S. 516; see Block, Suits against Government Officers and the Sovereign Immunity Doctrine, 59 Harv.L.Rev. 1060, 1078, 1082 (1946).

[Footnote 7] State of Louisiana v. McAdoo, 234 U.S. 627; In re Ayers, 123 U.S. 443.

[Footnote 8] Hawks v. Hamill, 288 U.S. 52; Morrison v. Work, 266 U.S. 481.

[Footnote 9] Fitts v. McGhee, 172 U.S. 516; Worcester County Trust Co. v. Riley, 302 U.S. 292.

[Footnote 10] The principle of the Lee case cannot be explained away by suggesting that at the time it was decided recovery could not be had against the United States in the Court of Claims for the misconduct of the governmental agent in seizing the Lee estate. The short and conclusive answer is that recovery against the United States could not be had today unless a whole series of cases is to be overruled. See, e.g., Tempel v. United States, 248 U.S. 121, 130, 59, and the cases cited therein; Russell v. United States, 182 U.S. 516, 535, 906; Harley v. United States, 198 U.S. 229, 235, 25 S. Ct. 634, 636; Hill v. United States, 149 U.S. 593; United States v. North American Trans. & Trading Co., 253 U.S. 330, 335, 520; Juragua Iron Co. v. United States, 212 U.S. 297. And there is nothing in the Federal Torts Claim Act which would indicate that under its provision suit could be brought. 28 U.S.C. 2680(a), 28 U.S.C.A. 2680(a).

[Footnote 11] This case is clearly apposite to the question whether in a suit against an agent the defense of sovereign immunity is applicable. To take away the immunity of a governmental corporation merely prevents the corporation from claiming that it is immunized from suit. But a suit will still not lie if a decree will affect the Government's, rather than the corporation's, property.

[Footnote 12] When Congress has wished to displace the ordinary remedies against the agent, it has used explicit language to do so. See, e.g., 56 Stat. 1013, 35 U.S.C. 89A96, 35 U.S.C.A. 89A96; 36 Stat. 851, as amended, 40 Stat. 705, 35 U.S.C. 68 (now 28 U.S.C.A. 1498). It is of course not a denial of due

process to make the remedy, even for unconstitutional action of the agents who do the Government's work, solely against the Government instead of the agent who committed the wrong. Cf. *Coffman v. Federal Laboratories, Inc.*, 3 Cir., 171 F.2d 94; *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331; *Crozier v. Fried Krupp Aktiengesellschaft*, 224 U.S. 290. It is upon such cases, interpreting specific provisions, stating that relief should be only against the Government, that the Court relied in *Yearsley v. Ross Construction Co.*, 309 U.S. 18. That case is based on the *Richmond Screw Anchor Co.* case and the *Crozier* case and is to be understood in the light of them. In the *Yearsley* case suit was brought against a governmental agent who had taken land under a statute which authorized the taking of that particular land.

Impliedly the owner was to be compensated for it in the Court of Claims. The Court held that in an authorized taking there is no liability on the part of the Government's representatives who do the taking. The fact that there was entire compensation provided for emphasized the exclusive character of the remedy against the Government. In other words the Court was dealing with a situation like the one involved in the *Richmond Screw Anchor Co.* case. Thus the *Yearsley* case does not touch the cases decided, before and since that decision, on the basis of the *Lee* line of cases. Moreover, in this case petitioner alleges that there was no authority on the part of the defendant to rescind the contract. This Court has explicitly rejected the theory that the Government could be sued for a tort in such circumstances. *Tempel v. United States*, 248 U.S. 121, 129, 58, and cases cited; see also 28 U.S.C. 2680(a), 28 U.S.C.A. 2680(a).

[[Footnote 13](#)] 'Whether this immunity is an absolute survival of the monarchical privilege, or is a manifestation merely of power, or rests on abstract logical grounds, see *Kawananakoa v. Polyblank*, 205 U.S. 349, it undoubtedly runs counter to modern democratic notions of the moral responsibility of the State. Accordingly, courts reflect a strong legislative momentum in their tendency to extend the legal responsibility of Government and to confirm Maitland's belief, expressed nearly fifty years ago, that 'it is a wholesome sight to see 'the Crown' sued and answering for its torts.' 3 Maitland, *Collected Papers*, 263.' *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 57, 59, 878, 879 (dissenting opinion). See also *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 580, 582, 748, 749 (dissenting opinion).

[[Footnote 14](#)] Of course if control is sought over property which the Government seeks to retain, the considerations as to whether the equitable relief should be granted might be different. Cf. *State of Louisiana v. Garfield*, 211 U.S. 70; *Goldberg v. Daniels*, 231 U.S. 218. Here, however, that question is not involved since the coal to which the plaintiff asserts title is, according to the complaint, to be sold to another dealer. As between the two, the plaintiff, if it be a fact that he has fully complied with the contract, is entitled to the property. The threatened transfer of property wrongfully withheld from the plaintiff may be enjoined if the conventional requirements of equitable relief are present.