THE POLITICAL ASPECTS OF JUDICIAL POWER: SOME NOTES ON THE PRESIDENTIAL IMMUNITY DECISION

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I. INTRODUCTION

We live in a society that chooses with increasing frequency to leave its most difficult questions for judicial resolution. Until recently, however, the problem of how to punish a miscreant who happens to reside in the White House had never been tossed into the courts. When the President went wrong, the political system dealt with him.

Presidents have gone wrong frequently. Presidents have been accused of misconduct in office for about as long as there have been Presidents.1 If the more recent Chief Executives sometimes seem to have been especially fond of abusing their powers,2 that may only be because historians, viewing the distant past through the glass of folklore, have been kind.

Rarely have formal punishments for presidential misconduct been meted out. Only one President has been impeached. None has ever been convicted. The process, moreover, has been decidedly political: The three Presidents who came closest to being formally removed from office—John Tyler, Andrew Johnson, and Richard Nixon—were extraordinarily unpopular by the time Congress began to act against them. In general, presidential abuse of authority has been punished, if at all, through legislative actions short of impeachment, through failure of reelection, or through trashing of the President's historical image. The federal courts have played only a limited role in keeping Presidents within the bounds of the law. When they have reviewed presidential actions, they have almost always done so indirectly through the fiction of a suit against the official charged with implementing the

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1 See generally RESPONSES OF THE PRESIDENTS TO CHARGES OF MISCONDUCT (C. Woodward ed. 1974).

2 See, e.g., A. SCHLESINGER, THE IMPERIAL PRESIDENCY (1973); Bernstein, The Road to Watergate and Beyond: The Growth and Abuse of Executive Authority Since 1940, LAW & CONTEMP. PROBS., Spring 1976, at 58.
disputed policy. Until just a few years ago, courts routinely dismissed actions naming the President as a defendant. The courts willingly sent signals to the other branches on the constitutionality of presidential acts, but they refused to proceed against the President directly. So matters stood when, in the summer of 1974, a unanimous Supreme Court ruled in United States v. Nixon that, in appropriate circumstances, the President was a proper subject for judicial process. The Court found judicial process appropriate where the President had custody of tape recordings subpoenaed for use in a criminal case. By refusing to quash the subpoena, the Justices raised a fresh question, one that prior practice had avoided: What if the President refuses to comply? That question became moot; he did comply, leaving legal scholars to speculate on whether the federal courts could have held him in contempt if he had not.

This Article speculates that the contempt issue should be viewed as part of a larger question: Who has the authority to punish the President when he violates his oath? Punishment of the President, the Article suggests, is in essence a political task. The Article takes as its point of departure Nixon v. Fitzgerald, decided by the Court early in the summer of 1982. In Nixon v. Fitzgerald, the presidential immunity decision of this Article's title, a sharply divided Court ruled that an individual's suit for damages was not a circumstance in which subjecting the President to judicial process was appropriate. The message of that case may well be that had the President not turned over the tapes at issue in United States v. Nixon, the federal courts could have done

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8 Through the years, many a landmark decision has been rendered in this manner. See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (suit against Secretary of State); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (The Steel Seizure Case) (suit against Secretary of Commerce); Dames & Moore v. Regan, 453 U.S. 654 (1981) (The Iranian Assets Case) (suit against Secretary of Treasury). Before the Court's 1952 decision in Youngstown, presidential actions challenged in federal court through this subterfuge were invariably sustained. See Kauper, The Steel Seizure Case: Congress, the President and the Supreme Court, 51 Mich. L. Rev. 141, 144-51 (1952).


4 457 U.S. 731 (1982). This point is as good as any for a confession and a disclaimer. The author first became interested in these issues while serving as a law clerk to Justice Marshall during the Term in which the first presidential immunity case, Kissinger v. Halperin, 452 U.S. 713 (1981), came before the Court. The judgment in that case was affirmed by an equally divided Court. The author had no part in any deliberations concerning the second presidential immunity case, Nixon v. Fitzgerald, which provides the springboard for analysis in this essay. Nixon v. Fitzgerald, was briefed, argued, and decided after the author completed his clerkship.

7 Nixon v. Fitzgerald, 457 U.S. at 748.
nothing at all: the constitutional analysis in *Nixon v. Fitzgerald* leads almost ineluctably to the proposition that the judicial power of the United States does not include the authority to punish the President of the United States.

That conclusion is not indefensible, but in a society premised on the rule of law, it ought to be controversial. Early commentary on *Nixon v. Fitzgerald* focused on whether the case was rightly decided, rather than on the implications of the decision. Those implications, however, have both practical and theoretical significance, not because they spell doom for the republic, but because the reasoning and the result in the presidential immunity decision reflect a particular view of the judicial role in the system of checks and balances.

This view of the judiciary's role rests on something that those trained in the law do not always like to admit: the Constitution prescribes a system of government as well as of law, a political system as well as a legal one. The courts do not do everything that is necessary to govern the country, and when they act within the system of checks and balances, they are playing a political role. This system is dynamic and usually operates without judicially-enforceable rules. When the branches conflict, the winner will be not the one that cites the most cases but the one that can muster the most political support.

Judicial power to reach misconduct within the other branches of government thus has a political aspect. The power is exercised within a system of checks and balances, and the creation of any new remedy against one of the branches of government must affect the entire system. *Nixon v. Fitzgerald* suggests a judicial reluctance to create new remedies against the executive branch—even where needful to right a wrong—except in instances of the most compelling necessity. Demonstrating that the *Fitzgerald* result derives from the dual political and legal nature of the system requires that the Court's reasoning be re-

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9 After all, the United States has had Presidents for nearly two hundred years and none has ever been sued successfully for damages. That potential civil liability has been an important factor in presidential decisionmaking over the past two centuries is difficult to believe and impossible to prove. Moreover, the decisions that ultimately are the most important in the nation's history—whether to go to war, whom to nominate to the Supreme Court, how to structure a new regulatory initiative—would fall outside the reach of anyone's proposal for civil liability. Even Justice White's *Nixon v. Fitzgerald* dissent, which was joined by three other Justices, would apparently have granted absolute immunity for the performance of "a constitutionally assigned executive function, the performance of which would be substantially impaired by the possibility of a private action for damages." *Nixon v. Fitzgerald*, 457 U.S. at 785.
viewed in some detail, dissected, and then reassembled in slightly different form. This analysis will make possible a consideration of what the case really says about the judicial role in checking and balancing the other branches of the federal government and what it implies for the relationship of the other two branches with one another.

II. DISSECTING THE PRESIDENTIAL IMMUNITY DECISION

A. What the Court Said

To understand what really happened in *Nixon v. Fitzgerald*, it is important to recall the context in which it arose. The plaintiff, a discharged civil servant, sued for damages based on causes of action that he claimed were properly to be implied from federal law and from the Constitution. These implied causes of action were the ones that the Supreme Court refused to recognize in a suit against the President of the United States even though the Court had recognized similar causes of action with respect to persons other than the President. That the rejected causes of action were "implied" matters because implied rights of action make little sense as anything except common law, which is to say law created by judges. Although the Supreme Court has tried various other explanations for what federal courts do when they imply a right to sue, a statute or clause not expressly providing a right to sue cannot reasonably be said to "create" one. Even if implying a private right of action is viewed as an exercise in statutory construction, it

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10 The trial court held that Fitzgerald had stated causes of action under the first amendment, under 5 U.S.C. § 7211 (Supp. III 1979) (which grants executive employees the right to give congressional testimony), and under 18 U.S.C. § 1505 (Supp. III 1979) (which makes obstruction of congressional testimony a crime). 457 U.S. at 740-41 & n.20. The majority stated that the implication issue was not before the Court, id., but as the text makes clear, that is arguably the very question the Court decided.


12 For instance, at one time the Court explained that, in implying a right to sue, it was applying the common-law statutory tort doctrine. See Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39-40 (1916). In the mid-1960's, the Court explained that it was merely applying those remedies "necessary to make effective the congressional purpose." J. I. Case Co. v. Borak, 377 U.S. 426, 433 (1964). More recently, the Court has promulgated a four-part "test" for implying private rights to sue. See Cort v. Ash, 422 U.S. 66, 78 (1975). In the last several Terms, some of the Justices have suggested that the only proper question is whether Congress, at the time it enacted the legislation in question, actually "intended" to permit private suits. See Cannon v. University of Chicago, 441 U.S. 677, 717-18 (1979) (Rehnquist, J., concurring); id. at 718-30 (White, J., joined by Blackmun, J., dissenting); id. at 730-49 (Powell, J., dissenting).
is the judge who performs the delicate surgery necessary to graft a right to sue onto a substantive provision.¹³

Thus one point about Nixon v. Fitzgerald is immediately apparent: a decision for the plaintiff would have constituted the judicial creation of a particular type of remedy for presidential misconduct. The Court would not have been the umpire, but one of the players.¹⁴ Judicial activity of this sort is not by itself a bad thing; courts, after all, sit to create remedies as much as they sit to do anything else.¹⁵ If, however, a decision for Fitzgerald would have meant judicial imposition of a new remedy—one not mentioned in the Constitution—against the President, then the extent of judicial power to do so must be considered.

Before this issue may be discussed in any detail, a second point must be made. The majority opinion in the presidential immunity case may be read in two ways: either as a common law decision or as a constitutional decision. Nixon v. Fitzgerald clearly need not be viewed as a definitive constitutional holding. After all, if an implied right of action is a common law remedy, then the same court that has the power to create the remedy if it is a good idea, has the power to limit its scope. A decision to limit a common law remedy would make a statement about prudence, not about power. If Nixon v. Fitzgerald states a constitutional rule, then future Presidents will be immune from suit. If, on the other hand, the majority merely stayed its hand because to do otherwise at the time would have been imprudent, then the next case might easily be decided differently.

Nowhere does the majority actually state that its decision confers a constitutional immunity, although the opinion includes dicta that may be read to so indicate.¹⁶ The opinion is, however, full of references to

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¹³ The Court's rhetoric has often treated the process as one of statutory construction, but the conclusion that implied rights of action amount to judge-made law is not so easily avoided. For precisely this reason at least one Justice has recently expressed reservations about the entire implication question, suggesting that the creation of a right to sue is a legislative responsibility and that by creating the right themselves, the Justices may be violating the doctrine of separation of powers. See Cannon v. University of Chicago, 441 U.S. 677, 730-49 (1979) (Powell, J., dissenting). But see Greene, Judicial Implication of Remedies for Federal Statutory Violations: The Separation of Power Concerns, 53 TEMP. L.Q. 469 (1980) (separation of powers doctrine presents no bar to implication of remedies).

¹⁴ This distinction between the roles that the Court plays in different kinds of constitutional adjudication is discussed in somewhat greater detail infra text accompanying notes 107-23.

¹⁵ See infra text accompanying notes 131-33.

¹⁶ See, e.g., Nixon v. Fitzgerald, 457 U.S. at 747 (immunity decisions “have been guided by the Constitution”) (emphasis added); id. at 748 (“implicit in the nature of the President’s office in a system structured to achieve effective government under a constitutionally mandated separation of powers”); id. at 749 (immunity is “rooted in the constitutional tradition of the separation of powers”) (emphasis added). The opin-
what constitutes proper public policy. At the outset the Court announces that its inquiry will necessarily involve "the kind of 'public policy' analysis appropriately undertaken by a federal court." Later the majority explains: "Cognizance of . . . personal vulnerability frequently could distract a President from his public duties, to the detriment not only of the President and his office but also the Nation that the Presidency was designed to serve." A cause of action against the President, the Court says a few sentences later, is not "needed to serve broad public interests." And in an ambiguous sentence at the end of its opinion, the Court concludes that its rule of absolute immunity will "advance compelling public ends." The thrust of the Court's reasoning is simply that civil damages liability for the President is not a good idea. The majority opinion makes repeated references to such concepts as "the separation of powers," but it is impossible to tell whether the Court means to suggest that constitutional principles mandate the result, or simply that they help show why immunity is good policy.

There is, of course, nothing unusual in the Court's undertaking.
public policy analysis on constitutional issues, and under the Constitution's more open-ended clauses, analysis of this kind is virtually the norm.28 The legitimacy of constitutional reasoning is much enhanced, however, when it is tied expressly to the Constitution itself.24 When the Court's arguments are not directly tied to the Constitution, as they were not in Nixon v. Fitzgerald, the resulting policy analysis is generally open to a scathing retort: "Sez who?" If, on the other hand, the Court merely used its inherent discretion to place limits on a cause of action it had itself created by using common-law authority, then the answer "Sez we" is more than adequate. The common law is what the judges say it is.25

Thus "presidential immunity decision" must turn out to be something of a misnomer. If the Supreme Court merely decided that it would not extend a judicially-created remedy to the President, because doing so would be a bad thing, then the decision takes on spectacular unimportance. On that reading, Nixon v. Fitzgerald decided not a point of constitutional doctrine, but a point of common law. The statement the case made was then about prudence, not about power, and Congress, should it muster the political will, can overturn that statement by legislative action. The fact that the majority reserved the question whether Congress may subject the President to civil damages liability through statute28 adds weight to the hypothesis that the case is merely one of common law and therefore decided relatively little.

If Nixon v. Fitzgerald did not decide whether the President possesses an immunity that is constitutional in scope, then the question of judicial power posed so ominously a few paragraphs back remains

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25 That is not to say that the development of common law rules should or can be altogether unprincipled. On the contrary, appeal to principle is essential. The distinction between common law rulemaking and constitutional rulemaking generally lies in the sources of the principles to which the appeal is made. See generally Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 Yale L.J. 221 (1973).
28 457 U.S. at 749 n.27 ("In the present case we... are presented only with 'implied' causes of action, and we need not address directly the immunity question as it would arise if Congress expressly had created a damage action against the President of the United States."); cf. id. at 763 n.7 (Burger, C.J., concurring) ("once it is established that the Constitution confers absolute immunity, ... legislative action cannot alter that result"); id. at 765-66 (White, J., dissenting) (if the Constitution creates the immunity, Congress cannot abrogate it by statute).
open. After all, if Congress can constitutionally create a civil damages remedy against the President, then it is hard to imagine what constitutional principles would prevent the federal courts from doing so as well. Courts were creating remedies for official misconduct long before there was a United States of America, and nothing in the Constitution appears to have stripped them of that power. So if Congress is indeed free to overrule the presidential immunity decision, then perhaps no constitutional rule was intended after all.

A judicial opinion, however, is rarely a complete explanation of why a court has decided a case in a particular way. The Court’s statement that the congressional power issue should be left open need not be read as an indication that in the minds of the Justices in the majority, the issue truly is open. Peeking behind the scenes is impossible, but any number of plausible reasons for “reserving” the question immediately spring to mind. The reservation might have been made to hold a majority, to make the decision more palatable to the public and to scholars, to gain a sixth or seventh vote in order that the outcome seem more decisive, or for some other reason. The reservation might also reflect a genuine concern on the part of one or more of the Justices that the power of the federal courts to create new remedies against the President may be distinguishable constitutionally from the power of Congress to create such remedies.

A hypothesis that the Constitution grants broader authority to

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27 The Court has posed the question before, and has even implied an answer. See Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867) (federal court cannot issue order against President), discussed infra text accompanying notes 53-55.

28 But see infra text accompanying 34-39. On the other hand, one can easily imagine principles that would prevent the state courts from assuming the constitutional power to punish the President. State courts are often appropriate forums for the vindication of federal rights, see Testa v. Katt, 330 U.S. 386 (1947), but the federal courts play a special role in the system of checks and balances, see generally The Federalist Nos. 51 (J. Madison) (system of checks and balances); The Federalist Nos. 78 & 81 (A. Hamilton) (special judicial role).


30 See, e.g., Bivens v. Six Unknown Agents, 403 U.S. 388 (1971) (implying right to sue from constitutional protections). This should not be taken to suggest that the power to create remedies is without limits. As will become clear, the thrust of this Article is quite to the contrary.

31 See generally W. Murphy, Elements of Judicial Strategy (1964).


Congress than to the courts to create remedies against the President would not be an unreasonable one. For example, one might argue that because the constitutional system places so many express checks on presidential power directly in the legislative branch,\(^{34}\) that branch also ought to have special authority (if anyone has it) to create new ones. After all, legislating is by definition an innovative activity, and any congressional statute dealing with the executive branch is likely to circumscribe presidential authority in some manner.\(^{35}\) If the Congress can limit the President's authority, why can't it legislate to punish him directly?

The Presidential Recordings and Materials Preservation Act of 1974\(^{36}\) may be seen as an example of punitive legislation. Every other President has been permitted to collect his papers and dispose of them as he pleased upon leaving the White House. The Act denied that privilege to Richard Nixon. In *Nixon v. Administrator of General Services*,\(^{37}\) the Court upheld the Act against, among other things, a separation of powers challenge. The Court conceded that the President had strong claims of confidentiality, but, it explained, in the narrow circumstances surrounding the Nixon resignation, Congress had the power to revoke the President's traditional "privilege" of retaining his papers and effects.\(^{38}\) The Act was a creative remedy for presidential misconduct and was upheld even though the Act may have resulted more from congressional pique than from concern for the accuracy of his historical record. The point is that the Court permitted the Congress (whatever its motivation) to act innovatively to impose a punishment that the Court itself could not have imposed.\(^{39}\) By analogy, Congress might, in the proper circumstances, have the constitutional authority to create civil damages remedies against the President, even if the federal courts

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\(^{34}\) Several of these checks are discussed in more detail *infra*, notes 185-203 and accompanying text.


\(^{38}\) *Id.* at 441-46. The Court did not address other constitutional arguments against the Act's application to specific documents. See *id.* at 436-39. One commentator has suggested that Nixon retains certain first and fourth amendment rights. See Note, *Government Control of Richard Nixon's Presidential Material*, 87 *Yale L.J.* 1601 (1978).

\(^{39}\) In a proper case, a court can order one who has custody of evidence to preserve it, but the Act went well beyond the need to preserve presidential materials for any particular litigation. The distinction drawn in the text should not be carried too far. To say that a court cannot create the same remedies as Congress can is not to say that the court has less power to create the remedies that it has traditionally created. See *infra* text accompanying notes 131-56.
lack power to do so. If the Constitution gives Congress greater power than it gives the judiciary to create remedies against the President, then the majority's reservation of the congressional power issue does not prevent the decision's being read as a constitutional one or necessitate its being read as a common law one.

This is, of course, sheer speculation. Nevertheless, the mere possibility that the Constitution authorizes broader powers for the Congress than the courts means that the dissent may be correct in characterizing the opinion as stating a constitutional rule. As the dissenters read the majority opinion, the majority has said that something about the Constitution—the majority leaves unclear precisely what—prohibits the courts from creating a civil damages remedy against the President. Because a constitutional immunity is likely—though not certain—to bar Congressional action as effectively as it does judicial action, a finding that the courts cannot impose a particular penalty probably means that the Congress cannot impose it either. Although safe from judicially and congressionally created remedies, the President would not be "above the law." The only sanctions available in the event of his misbehavior, however, would be those explicitly set forth in or readily inferred from the Constitution itself.

B. What the Court (Might Have) Meant

The majority denied the charge that its opinion placed the President above the law, and yet clearly knew that its decision would leave

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40 Naturally, the mere fact that Congress's authority to legislate to control the President is broad does not imply that the authority is unlimited. As with other congressional powers, it must be exercised in a manner consistent with other provisions of the Constitution and, in particular, must not be used in derogation of the principles of separation of powers. For an important recent reminder of this rule, see Immigration & Naturalization Serv. v. Chadha, 103 S. Ct. 2764 (1983), discussed infra text accompanying notes 194-202.

41 Congress might be able to circumvent the presidential immunity decisions (even if the Court meant to establish a constitutional rule) by extending the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2880 (1976), to encompass actions for damages caused by presidential act or order. Cf. P. Schuck, supra note 29, at 113-18 (analogous proposal for wrongs by lower-level officials). As long as the defendant in a suit under the amended Act would be the United States and not the President and as long as any judgments would be paid from general revenues and not passed on to the President, then most of the constitutional objections to presidential liability would fall. If the President were asked to produce papers or appear personally in connection with such a suit, considerations of separation of powers would likely permit him to refuse. I am grateful to Martha Minow and Peter Schuck for bringing these points to my attention.

42 See Nixon v. Fitzgerald, 457 U.S. at 767 (White, J., dissenting) ("the Court clothes the office of the President with sovereign immunity, placing it beyond the law"), and id. at 758 n.41 (majority opinion) ("This contention is rhetorically chilling but wholly unjustified.").
little besides the sanctions explicitly authorized by the Constitution to check the conduct of an evil President.\textsuperscript{43} The majority noted that impeachment and other "formal and informal checks" would remain available.\textsuperscript{44} Unless reliance is placed on historical references that may not bear the weight,\textsuperscript{45} the references to other constitutional sanctions (along with the vague allusions, already mentioned, to the separation of powers) are as close as the majority comes to tying its reasoning to the Constitution itself. The result has an air of \textit{expressio unius}: because the Constitution creates particular checks on presidential authority, a court may not create fresh ones.

The Court cannot really have meant to deny the validity of any check not expressly mentioned in the Constitution. After all, \textit{U.S. v. Nixon} held that the courts can command the President to comply with subpoenas despite the lack of explicit textual support for such a power. Nevertheless, the Court's \textit{expressio unius} approach may form the basis of a theory explaining the result.\textsuperscript{46} The Presidency (the Court may

\textsuperscript{43} The term "evil President," like the term "immunity," is used advisedly. Although the lines might be difficult to draw, nothing in the presidential immunity decision suggests that a President who, for example, injured someone through negligence \textit{not} related to his office would necessarily be immune from suit. \textit{Nixon v. Fitzgerald} by its terms immunizes the President only from suits relating to his official conduct and abuses of his official authority. One possible brightline would distinguish between those things that he is able to do only because he is President and those things that anyone could do. The former would come within the scope of his immunity and the latter would not. Obviously, a private citizen would not have the opportunity to fire a civil servant. The President of the United States might or might not have the authority to do so, but his office would provide the opportunity. There is no need to make too much of this distinction, and some of the arguments in the text admittedly cut against it. This distinction is, however, one approach to making the result in the presidential immunity case more palatable to those who find it distasteful.

\textsuperscript{44} \textit{Nixon v. Fitzgerald}, 457 U.S. at 757.

\textsuperscript{45} The majority consigned its historical discussion to a single lengthy footnote. \textit{Id.} at 750-52 n.31. Justice White's dissent vigorously disputed the majority's reading of the history, \textit{see id.} at 771-79, which may be why the Court did not belabor it. The majority could, however, have constructed a stronger historical argument than the one it actually used. \textit{See infra} notes 69-92 and accompanying text.

\textsuperscript{46} Of course, a demand for theory may be naive or even a cheap shot in these days of doubt as to whether the Supreme Court is institutionally capable of principled decisionmaking. Scholarship from all points on the ideological compass has contributed to the doubt. \textit{See}, e.g., Brest, \textit{Interpretation and Interest}, 34 STAN. L. REV. 765 (1982) (interest of decisionmaking elite, rather than positive theory, determines outcome); Easterbrook, \textit{Ways of Criticizing the Court}, 95 HARV. L. REV. 802 (1982) (Arrow's theorem demonstrates that no structure can ensure consistent outcomes if Court complies with other norms of judicial decisionmaking); Leedes, \textit{The Supreme Court Mess}, 57 TEX. L. REV. 1361 (1979) (judicial activism leads inexorably to doctrinal inconsistency); Tushnet, \textit{Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory}, 89 YALE L.J. 1037 (1980) (contradictions in liberal democratic theory make consistent constitutional theory impossible). The conclusions drawn in these articles may be right or wrong; for the purposes of the analysis in this Article, I will pretend that theory is both desirable and important.
have reasoned) is a political office, and under the constitutional scheme, punishing the President is the responsibility of the overtly political actors—the Congress and the voters. Because of the awesome responsibilities of his office, the President must often worry about the consequences his actions will have for the country but he should not—needlessly—bear the additional burden of fearing for personal consequences to himself. The argument that the President's office and duties are of such a nature as to render him unique in any constitutional analysis has been made too often to bear repeating here. Suffice it to say that the majority opinion in Nixon v. Fitzgerald has some of the flavor of this argument.

Thus (so the majority's analysis could run), the judgment that the President has gone too far, so far that he must be threatened with personal liability even at the cost of distracting him from his official duties, is a difficult judgment and an essentially political one. The question ought to be resolved by the political actors, and that is where the Constitution has wisely placed the express power to check presidential abuses of authority. If this line of reasoning is what actually underlies the presidential immunity case, then the decision begins to make a fair amount of sense and even acquires a certain logical appeal. The line of reasoning resembles that underlying one strand of the "political question" doctrine: the text and structure of the Constitution commit the decision elsewhere, so the federal courts must keep their hands off. That restraint, because it reinforces judicial legitimacy, remains one of the most powerful arrows in the judicial quiver.

If the preceding two paragraphs fairly state what the majority

47 See, e.g., Bruff, Presidential Power and Administrative Rulemaking, 83 YALE L.J. 451, 467-70 (1979); Van Alstyne, A Political and Constitutional Review of United States v. Nixon, 22 UCLA L. REV. 116, 130-40 (1974). The most frequent argument for presidential uniqueness is the President's status under the constitutional structure. As Professor Corwin put it: "The Constitution knows only one 'executive power,' that of the President, whose duty to 'take care that the laws be faithfully executed' thus becomes the equivalent of the duty to and power to execute them himself according to his own construction of them." E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 84 (4th ed. 1957) (emphasis deleted); see also infra note 112 and text accompanying notes 127-30.

48 See 457 U.S. at 757. ("The President is subjected to constant scrutiny by the press," to "vigilant oversight by Congress," to "a desire to earn re-election, the need to maintain prestige as an element of Presidential influence, and a . . . traditional concern for . . . historical stature.").

meant, then far from collapsing into a narrow statement of federal common law, the opinion in Nixon v. Fitzgerald says something tremendously important: the federal courts lack the power to punish the President at all. For if the courts cannot compel him to pay damages to a private individual, it is difficult to see how they could force him to pay damages—in the form of a fine—directly to the court. And if the courts cannot force him to part with his money, they surely could not order him to jail. Yet those two weapons—deprivation of money and deprivation of liberty—are the only ones that a court can use to force compliance with its mandates. Absent those powers, a court may well issue an injunction or a subpoena, but the court's order may, as Judge Wilkey put it, turn out to be nothing more than a piece of paper bearing the title. That the court's decision may be ignored does not mean that no process against the President should ever issue; as will become clear, decision and enforcement are logically separable. The possibility that the President might simply disregard the judicial will does mean that if the presidential immunity decision makes a statement about constitutional law, that statement may really be that the federal courts cannot force the President of the United States to do anything at all.

C. What the Court (Should Have) Said

The conclusion that the federal courts lack authority to punish the

60 One might argue that in the case of a fine for contempt, the Justices are protecting their own sphere—the judiciary—rather than "merely" defending individual rights. If one looks through the other end of the telescope, however, one will note that both cases involve the same issue: can the Court punish the President for doing wrong? The fact that one wrong is done to an individual and the other to an institution (admittedly a coequal one) does not change the question, and there is no immediately apparent reason why it should change the answer.

61 In the original Watergate-related litigation over whether the President was the proper subject of a subpoena duces tecum—litigation which did not reach the Supreme Court—the United States Court of Appeals for the District of Columbia Circuit stated explicitly that the President's legal obligation to obey a court order did not rest on the court's power to enforce it:

That the Impeachment Clause may qualify the court's power to sanction non-compliance with judicial orders is immaterial. Whatever the qualifications, they were equally present in Youngstown. . . . The legality of judicial orders should not be confused with the legal consequences of their breach; for the courts in this country always assume that their orders will be obeyed, especially when addressed to responsible government officials.

Nixon v. Sirica, 487 F.2d 700, 711-12 (1973) (en banc). The dissent scoffed at this suggestion, arguing that a subpoena naming a party against whom it could not be enforced was no more than "a piece of paper captioned 'subpoena.'" Id. at 792 (Wilkey, J., dissenting). The majority opinion adopted the approach advocated here, treating decision and enforcement as logically distinct.
President of the United States may at first seem somewhat startling, but after a little thought, it makes more sense. One may begin by hypothesizing the contrary. Suppose a court did try to hold the President of the United States in contempt for disobeying an order addressed to him. Would federal marshals arrive at the White House, demanding that the Secret Service agents let them seize the President? Suppose the President—with the assistance of the security personnel—decided to resist arrest. Aside from a definite air of lese majesty about the whole thing, there is also the undeniable fact that should matters come to a showdown, the President has more guns at his command than a federal court does. The Supreme Court has never pretended otherwise. During the Reconstruction Era, the Court in *Mississippi v. Johnson* took explicit note of the difficulties it would encounter in trying to "force" a President to comply with an order, and dismissed a complaint against President Andrew Johnson. Earlier opinions included dicta to similar effect.

The mere fact that forcing the President to pay damages might not be easy does not by itself justify a constitutional rule against trying. After all, President Nixon did turn over the Watergate tapes, even though the federal courts probably could not have enforced a contempt citation against him. Besides, resistance to judicial decrees is hardly

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52 The usual rule is quite the contrary: even claims of fundamental right are no defense in a contempt proceeding for ignoring an injunction. See *Walker v. City of Birmingham*, 388 U.S. 307 (1967). The thrust of the presidential immunity decision (and of this Article as well) is that when it comes to court orders, the President is a special case. I am grateful to Robert Cover for reminding me that the courts frown on claims of a "right" to ignore their orders.

53 *71 U.S. (4 Wall.) 475* (1867).

54 See *id.* at 500-01: "[I]t is needless to observe that the court is without power to enforce its process."


56 Cf. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 476-78 (1793) (dictum) (sovereign immunity derives from ability to resist judicial process).

57 If the mere possibility of presidential resistance sufficed to trigger presidential immunity, it would not be easy to draw lines between the President and his subordinates, many of whom could also—especially with presidential assistance—resist the orders of a court. As will become clear, the President's power is important, but something more is required before immunity is appropriate. There is a distinction, moreover, between judicial restraint and judicial cowardice, a distinction discussed in greater detail infra, text accompanying notes 161-69.

58 President Nixon's decision to yield the tapes need not be read as an acknowledgement of judicial authority. He may simply have been bowing to political reality.
new. Had the President not decided to send troops to Little Rock in the wake of *Cooper v. Aaron*, the schools in that city might be segregated to this day. The Court’s inability to enforce its order without the assistance of the executive branch did not mean that the Justices had no power to issue the order. Thus the claim that the Court lacks power to punish the President must be defended on some ground other than the Court’s lack of enforcement power.

In supporting its conclusion in *Nixon v. Fitzgerald*, the majority focused on what it considered the public policy reasons militating in favor of an immunity rule. Justice White’s dissent at least showed that these arguments have two sides. The malleability of public policy arguments makes the majority’s reasoning suspect, but need not vitiate the result. In order to tie its decision more closely to the Constitution, the Court could have relied on something other than public policy.

Before suggesting some justifications that, although available, were absent from the majority opinion, it is useful to pause and recall what the case did not involve. The Court was not required to construe the Constitution’s “open-ended” provisions protecting individual rights against government abuse. The dilemma whether to read those clauses as though the Constitution were a statute—or perhaps a contract—or to take them as invitations to import extra-constitutional values motivates much contemporary scholarship on constitutional theory.

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See infra note 113.


62 The text may be a bit unfair; times have changed. The unanswered question remains one of chicken and egg—is integration more widely accepted because the courts have been successful in ordering it, or have the courts succeeded in ordering it because it is more widely accepted?

63 See *Nixon v. Fitzgerald*, 457 U.S. at 792-97 (White, J., dissenting) (attacking the majority’s “public policy” approach). See also Note, supra note 8, at 231 (“Far from supporting Justice Powell’s result, considerations of public policy point toward a grant of qualified, not absolute, presidential immunity”).

64 It is also useful to pause and recall that an argument that the presidential immunity decision could have been more powerfully reasoned is not the same as an argument that the case was rightly (or wrongly) decided. Constitutional theorists seek constitutional theory, in “good” decisions as well as in “bad” ones. The search for a theory to undergird the result in *Nixon v. Fitzgerald* is necessary, both to learn whether it can be harmonized with past decisions and to try to discern what messages it might carry for future ones.

65 Although citations for this point would probably be a bit gratuitous, some of the major currents in this muddy river might be discerned through a perusal of the widely divergent views expressed in the following four recent works: R. Berger, *Government by Judiciary* (1977); J. Ely, *Democracy and Distrust* (1980); M. Perry, *The Constitution, the Courts, and Human Rights* (1982); L. Tribe, *American Constitutional Law* (1978).
Happily, determining whether a reasoned constitutional basis exists for the presidential immunity decision does not require wading into the midst of that scholarly battle. Whatever the best approach to the adjudication of claims under the clauses protecting individual rights (and it is not at all clear that there need be only one), there is no apparent reason to believe that the same interpretive approach ought to apply to other constitutional provisions. Different sections of the document have different purposes and interpreting each in light of its purpose will probably lead to drastically different approaches. Thus, it is one thing to look to extra-constitutional sources in deciding what rights are "retained by the People" or incorporated in the phrase "Privileges or Immunities;" it is something else altogether to do so when considering whether federal courts can, for example, review a presidential decision to cast a veto—or whether the President is a proper defendant in a suit seeking civil damages.

Provisions describing the functions and powers of the government may demand a different interpretive approach from provisions describing the rights of the people. A strict textual approach, focusing on the understanding of the Framers, may be a more sensible method to use in interpreting the structural clauses of the Constitution. Whether it is a more sensible method will be examined in the next few pages. If the strict textual approach does make more sense, then the majority's public policy analysis is probably inadequate to justify a constitutional rule of immunity. It is therefore necessary to consider other possible justifications for the presidential immunity decision.

Professor Ely has implied (although he probably didn't mean it) that constitutional theorists should develop a single theory to explain adjudication under the entire Constitution. See J. ELY, supra note 64, at 41 n.* ("the Constitution is not divided into two sets of provisions, precise and open-ended"). In truth, some provisions of the Constitution, such as the requirement that the President be thirty-five years of age, are indeed more precise than others, such as the equal protection clause. Ely is apparently prepared to concede this disparity. See id. at 13 ("Constitutional provisions exist on a spectrum ranging from the relatively specific to the extremely open-textured"). Although Ely devotes much of his book to suggesting a single approach, it is not at all clear why a single approach is needed to explain all of the document's provisions, precise, open-ended, and merely muddy.

U.S. CONST. amend. IX.

U.S. CONST. amend. XIV.

On the other hand, it may not. See Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204, 237 n.124 (1980) ("Analytically and normatively, I see no essential differences among the various areas of constitutional concern that would automatically insulate any of them from the possibility of nonoriginalist decisionmaking"); Saphire, The Search for Legitimacy in Constitutional Theory: What Price Purity?, 42 Ohio St. L.J. 335, 337-38 (1981) (debate over best means of constitutional interpretation includes "major provisions regarding the . . . allocation [of] government power" when they are "quite general in [their] scope and delphic or ambiguous in [their] language").
1. The Original Understanding Approach

As a general rule, scholars frown on attempts to construe the Constitution by surveying the opinions of the eighteenth-century gentlemen who wrote it and voted on its ratification. The Supreme Court, on the other hand, rarely permits a constitutional case to go by without discussing the "original understanding." The original understanding—when one can be discerned—is more likely to be important in a case involving the system of checks and balances than it is in a case involving individual rights. The reason should be obvious. In protecting individuals against government mistreatment, those who drafted the 1787 Constitution and its amendments took pains to use language so broad as fairly to beg to be filled with substantive content from external sources. They used words sparingly, an approach that makes sense when one begins with a conception of rights as broad and government power as narrow. In structuring the government, however, the drafters set themselves rather a different task and used dramatically different language.

The 1787 Constitution set forth with painstaking attention to detail the powers and functions of the federal government. Despite a few glaring errors, the document reflects an obsessive concern for the minutiae of government operation. Words were used cautiously so as to

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70 But cf. Kelly, Clio and the Court: An Illicit Love Affair, 1965 SUP. CT. REV. 119 (asserting that the Justices use history badly because they twist it in order to support the results that they desire). See also Professor Laycock's stinging evaluation of the work of Raoul Berger (perhaps the most prolific contemporary advocate of paying close attention to the original understanding), quoted infra note 79.


72 A good example concerns the role of the Vice President. The Vice President serves as President of the Senate. U.S. CONST. art. I, § 3. When the President of the United States is tried in the Senate following impeachment by the House of Representatives, the Chief Justice of the United States presides. Id. That is the only provision in the Constitution requiring the Vice President to turn over the gavel to another individual. Yet the Vice President himself is also impeachable, and if impeached by the House, he would be tried in the Senate. It appears, therefore, that the Vice President could preside at his own impeachment trial, should he choose to do so.

73 This "obsession" with detail is only comparative. Few words in the document are used in defining the rights of the people. Many are used in explaining the operation of government. The details set forth in the Constitution often give inadequate guidance for the operation of the modern activist state, the rise of which the Framers could not, of course, have anticipated. See note 199 infra. That their obsession did not pro-
leave little room for interpretation. Thus although some wanted to make the President impeachable for any reason, the delegates in Philadelphia finally voted to limit impeachable offenses to “Treason, Bribery, or other high Crimes and Misdemeanors,” in the hope of limiting congressional power over him. The Constitution also does not include a requirement that members of the House of Representatives be “mature”—although maturity emerged as a major concern in the debates—but only that they be at least twenty-five years old. One can
duce perfect prescience does not mean that the obsession did not exist.


76 See 2 RECORDS OF THE FEDERAL CONVENTION 550 (M. Farrand ed. 1911) [hereinafter cited as RECORDS]. The Committee of Eleven had recommended limiting impeachment to cases of treason or bribery. Mason responded that many abuses of power would not fall within those narrow categories, and suggested the substitution of “maladministration.” But Madison, who drafted the phrase “high crimes and misdemeanors,” argued that Mason’s proposal was “[a] vague term” that it would “be equivalent to a tenure during the pleasure of the Senate.” Madison’s phrasing was adopted. Id. For a concise summary of the contemporary debate over which offenses ought to be impeachable, see G. GUNTher, CASES AND MATERIALS ON CONSTITUTIONAL LAW 430-31 (10th ed. 1980).

Madison’s notes on the Convention recite the following:

Col. Mason moved to insert “twenty five years of age as a qualification for the members of the 1st branch”. He thought it absurd that a man today should not be permitted by the law to make a bargain for himself, and tomorrow should be authorized to manage the affairs of a great nation. It was the more extraordinary as every man carried with him in his own experience a scale for measuring the deficiency of young politicians; since he would if interrogated be obliged to declare that his political opinions at the age of 21 were too crude and erroneous to merit an influence on public measures. It had been said that Congs. had proved a good school for our young men. It might be so for any thing he knew but if it were, he chose that they should bear the expense of their own education.

1 RECORDS, supra note 75, at 375. James Wilson challenged the assumption that the young were immature: “Many instances might be mentioned of signal services rendered in high stations to the public before the age of 25.” Id. The motion to make twenty-five the minimum age nevertheless carried by a vote of seven states to three, with one delegation undecided.

A similar reduction of vague qualifications to a term of years appears in Tench Coxe’s pseudonymous discussions of the President and members of the Senate, published in a Pennsylvania newspaper during the ratification debates under the byline “An American Citizen.” Of the President, Coxe wrote:

[H]e cannot be an idiot, probably not a knave or a tyrant, for those whom nature makes so, discover it before the age of thirty-five, until which period he cannot be elected. . . . Our President must be matured by the experience of years, and being born among us, his character at thirty-five must be fully understood.

2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 140-41 (M. Jensen ed. 1976) (emphasis deleted) [hereinafter cited as DOCUMENTARY HISTORY]. Coxe noted of Senators: “No ambitious, undeserving or unexperienced youth can acquire a seat in this house by means of the most enormous wealth or most powerful connections, till thirty years have ripened his abilities and fully discovered his merits
face, grants to Congress. The checks expressly authorized should be adequate to rein in an abusive President.\textsuperscript{199} If it is dissatisfied with the standard for benzene exposure promulgated by the Occupational Safety and Health Administration, Congress need not resort to a legislative veto to force a change. Congress could, for example, refuse to vote an appropriation that the President desires or postpone the confirmation of one of the President's nominees. Members of Congress should not hesitate to hold one program hostage in order to force changes in another.\textsuperscript{200} If public pressure makes this strategy impossible, that simply means that in a particular political struggle, the President has won. That a system does not in the face of opposing public opinion lead invariably to victory, hardly means that the system is evil or even weak.

Naturally, if Congress is going to use the full measure of its authority to force concessions in one area in return, perhaps, for retreating itself in another, the leadership will have to pay careful attention to the system of checks and balances. The decline of party discipline may mean that the leadership will have difficulty in exercising control,\textsuperscript{201} but with the demise of the legislative veto, enlightened self-interest may move the Members into more consistent coalitions. No other course is likely to lead to restoration of the balance of power, for the Supreme Court's opinions in Chadha and Nixon v. Fitzgerald stand as obvious calls to put politics back into the governing process.\textsuperscript{202} The system of checks and balances is, after all, a political one, and its structure suggests that the Framers cared more about making sure that no one

\textsuperscript{199} The term "abusive President" is used advisedly. Congress might be concerned with two types of abuses: those involving wrongdoing in office, for which punishment might be appropriate, and those involving the making of policy, for which pressure rather than punishment would be appropriate. In designing the system of checks and balances, the Framers were more concerned with the former than with the latter. They were worried about creating a tyrant who would abuse his powers. They did not anticipate that the President would (through the growth of the executive agencies) also outstrip the Congress in the race to make policy. For the Framers, Congress alone was the lawmaking body, and it was the President merely who would react to the legislature's initiatives. The alignment anticipated by the Framers has shifted nearly 180 degrees. The reasons for the shift are probably complex, see supra note 183, but the solutions must involve something other than attempts by Congress to find new ways to react to policies proposed by someone else. The legislative veto was constitutionally doomed in part because it tried to do precisely that. Instead, in keeping with the way the system of government was designed to work, Congress should be searching for ways to regain preeminence (or at least equality) in the proposal as well as in the disposal of policy initiatives.

\textsuperscript{200} See supra text accompanying notes 189-92.

\textsuperscript{201} But see supra note 183.

\textsuperscript{202} One of the most unfortunate aspects of the reform-minded 1960's and 1970's was the way that the word "politics" became more or less synonymous with "bad government." But the Constitution is a political document, not just a legal one, and not all decisions on wise policy need be made by "experts."
branch held total sway than they did about assuring the "best" decision on every issue that might arise. In developing the structure of government, the Framers sought to give each branch the powers necessary to respond to *patterns* of abuse.\(^\text{203}\)

Thus, probably no one thought in 1787 that a President would be impeached or defeated for reelection merely because he fired a single civil servant unjustly or ordered a single illegal break-in.\(^\text{204}\) A President *might* be impeached or defeated for either of those misdeeds, but the issue would be entirely political, in the literal sense of that word: the system would respond *if* public opinion considered the abuse sufficiently heinous. On the other hand, should a President order a series of illegal break-ins, sabotage political opponents, conspire to obstruct justice, *and* order secret military operations abroad, the Framers would undoubtedly have felt that a pattern had been established, that here was a tyrannical Chief Executive who had to go, whether by impeachment or by resignation.\(^\text{205}\)

The same would be true of an injunction or subpoena. Yes, a court

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\(^\text{203}\) Both the words of the document and its history make clear that the Framers contemplated impeachment of a President who committed a felony, but aside from felonies, the evidence does not suggest that the President was to be punished for discrete wrongs. This limitation should be plain from the structure of the government the Constitution creates. The machinery available for presidential punishment—impeachment, legislation, failure of reelection—is so unwieldy that it cannot easily be brought to bear on a President whose acts are, in the view of the political actors in the system, relatively minor. Some of the remarks made during the debates also suggest a concern for patterns of abuse rather than for wrongs done to particular individuals. During the Philadelphia Convention, Madison argued that without the remedy of impeachment, the Chief Executive "might pervert his administration into a scheme of peculation or oppression." 2 RECORDS, *supra* note 75, at 65-66. Randolph's fears that the President would grow too powerful in time of war absent the impeachment remedy, are difficult to understand in any other way. *Id.* at 67. And Franklin's half-joking reference to assassination, *id.* at 65, was not likely aimed at a President whose "misconduct" comprised a single wrong done to one individual.

The historical evidence is hardly conclusive on the point, but when joined with the structure of the system of checks and balances, the evidence does suggest rather strongly that the Framers were not worried about such issues as whether a single civil servant would lose his position unjustly. Perhaps the political and electoral checks on presidential misconduct are most effective when dealing with patterns of abuse but likely to fail when confronting individual claims of hardship that must, in the larger scheme, be considered *de minimis*. See *infra* note 209. Fortunately, the theory developed in text has the happy byproduct of permitting remedies for many individual claims. See *infra* text accompanying notes 208-19.

\(^\text{204}\) The articles of impeachment adopted by the House Judiciary Committee shortly before President Nixon resigned did not include either of these charges. As the text makes clear, however, the mere fact that Congress chooses not to impeach the President for a particular abuse of authority does not mean that he will go unpunished. Lesser sanctions are often available.

\(^\text{205}\) In fact, a strong argument can be made that the Nixon Administration ultimately became precisely the "scheme of peculation or oppression" that Madison insisted would render the Chief Executive impeachable. See *supra* note 203.
may issue one, but if the President chooses not to obey, then it is up to the political process to decide whether he ought to be punished for his act of defiance. The political process includes the Congress, which will act if a majority of its members choose to do so, and the public, which may act if a majority of its members choose to do so.\(^2^0^6\) If the political process does not force the President to obey a court order, then the President will get away with disobeying it. The conclusion that the enforcement of judicial orders must be left to the political process is not likely to please people trained as lawyers, because lawyers seek rules and standards, and if enforcement of judicial orders is left to the political process, then there really are none.\(^2^0^7\) Lawyers, however, sometimes forget that the Constitution is not merely a legal document; it is also a political one. It describes more than a legal system; it describes a system of government. Not all the decisions made in a system of government are legal decisions. Many of these decisions are political ones, made not by the lawyers in the system but by politicians and voters. Among the decisions the Constitution vests in the political system is the decision whether to punish the President of the United States.

**G. **But What About the Little Guy?

If punishing the President is up to the political system and if the Framers were interested only in the big picture, then isn’t civil damages liability an appropriate (which is to say, necessary and proper) means for granting relief to the little guy who has been wronged?

The answer is “no,” although as will be seen, the “no” is a qualified one. The system of checks and balances, the preservation of which should be of preeminent concern, is a political system, and the struggle for supremacy among the three branches is similarly a political one. Supplying relief for the little guy—applying the maxim *ubi jus, ibi remedium*—is not the purpose of the system.\(^2^0^8\) That is not because the system is evil, but because trying to provide the best means for relief in

\(^{2^0^6}\) The voters in turn may be influenced by the enormous power of the modern broadcast media, whose role in the function of the American political system has been only inadequately explored.

\(^{2^0^7}\) For all that it may bother lawyers, the realization that the system of checks and balances is essentially standardless would neither surprise nor disappoint a political scientist. Cf. Levinson, *Judicial Review and the Problem of the Comprehensible Constitution* (Book Review), 59 Tex. L. Rev. 395, 401 n.31 (1981) (suggesting distinctions between views taken by lawyers and those taken by political scientists on same institutions).

\(^{2^0^8}\) To say that relief for the wronged little guy is not the purpose of the system is not to say it does not exist within the system. Fitzgerald himself, the plaintiff in the presidential immunity case, was reinstated with backpay, in addition to being permitted to pursue damages against presidential assistants.
every case could, if it involves the creation of new remedies, raise the same intractable problem discussed in the last few sections: The system of checks and balances exists to eliminate the possibility of domination by a single branch of government. The system was not designed to vindicate each individual's every assertion of right. Any attempt to modify the system to provide additional checks and balances carries the risk of undermining the entire system. If one branch can "discover" or "impose" a fresh remedy (especially for misconduct that must, in the grander scheme, be considered *de minimis*) then that branch has a fresh weapon in its continuing struggle with the other two branches. In the absence of strict necessity, the constitutional scheme will not tolerate the creation of these new remedies. "Necessity," moreover, must refer to keeping the power in balance, and not to righting every wrong.

Improper presidential acts that do not provoke Congress into using one of its big sticks—impeachment, say, or a rebellion on appropriations—may yet be punished. If the President has political enemies carefully cataloging his misconduct—and most Presidents do—then all his acts that are even arguably wrong will be added to that list. If the list grows long, the President's misdeeds may come back to haunt him as his opponents recite them from the pulpits of the press and the broadcast media. Perhaps more important, the petitioners can be heard by Congress if that body shows the spine and spunk to hear them. The President would not necessarily be impeached and convicted as a result, but even now, individual members of the Senate and the more powerful members of the House are frequently able to take individual grievances to the Administration. Of course, the administration may turn a deaf

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209 Certainly the wrongs charged in *Nixon v. Fitzgerald* were great and heinous, but that is not the question. The question is whether, if necessity is a criterion for the validity of new remedies, the necessity required should be based on the needs of a small group of individuals or on the needs of the system. The thesis expounded in this essay is that the only necessity justifying the creation of a fresh remedy is a fundamental breakdown in the system of checks and balances, a reason to believe that the system is not functioning as the constitutional structure requires. A failure to punish the President for a particular, discrete wrong does not amount to a breakdown of this sort. Although one might argue that a failure to rectify a wrong done to even one citizen is a breakdown that the system cannot tolerate (a proposition that is not easy to sustain, cf. *infra* note 215), the argument cannot fairly be made in the case of a suit seeking damages for injury resulting from presidential misconduct. The President cannot act alone, and someone will always be available as a proper defendant. *See infra* text accompanying notes 216-17.

210 This description of the process of seeking a remedy may bring back memories of old-style "boss" and "machine" politics, and the days when a citizen with a grievance against the government went to see the local ward leader. The image may be distasteful, but one should bear in mind that the idea of politicians acting out of squeaky clean idealism is of relatively recent vintage. An important part of political power, moreover, is the willingness to act to assist real individual people rather than
ear, but if it does so too often, then a Congress that is fulfilling its role in the system of checks and balances should slow legislation, appointments, or treaties the President has promoted, until the administration becomes more cooperative. In this manner executive power can be controlled even if Congress takes no formal measures.

Very well: in rare cases some sort of institutional response may be forthcoming. But it will not be forthcoming in all cases, and perhaps not in most. A wronged individual may bring his complaint to Congress and yet receive no satisfaction. His Representative might ignore him, the Judiciary Committee might make no report, the House might vote not to impeach, the Senate, not to convict. None of that would mean, however, that the system was not working. It is a little like something Ann Landers once wrote of prayer: When someone prays but does not get what he wants, it does not mean that the prayer has gone unanswered. It means only that the answer is "No."

The political system would be called upon to answer the question whether the wrong done to a single individual by the President while handling the myriad responsibilities of his office outweighs everything else he might have done in a competent, even a brilliant, manner. The answer often will not be easy. If Congress refuses to act, then it has struck the balance against the petitioner and in favor of the status quo. If the President’s abuses grow, however, his partisans in Con-

acting on behalf of some amorphous concept of “the masses.”

This argument does not mean that the Constitution was in some sense “designed” to function in a system relying on political favors and debts. In their public rhetoric, many of the Framers professed the ideological conviction that political parties are anathema to the republican ideal. Arguably, the Constitution was drafted in part to limit the influence of parties. See R. Hofstadter, The Idea of a Party System 1-73 (1969). On the other hand, whether or not accepted in theory, political parties certainly existed and flourished before 1787. See generally J. Main, Political Parties Before the Constitution (1973) (statistical analysis of voting patterns in state legislatures). Many preconstitutional party leaders represented their states at the Philadelphia Convention. See id. at 409-53 (names of party leaders). These party leaders presumably did not go to Philadelphia to reduce their own influence.

As voters have become more sophisticated and party identification less important, the power and importance of political parties have declined. See S. Huntington, supra note 181, at 205-10. That decline does not mean, however, that the ability of a single politician to seek relief for a constituent, or of a number of politicians to form temporary coalition on behalf of many constituents, has changed.

Congress may fail to act for any number of reasons, including mere partisanship. See Berger, The President, Congress, and the Courts, 83 Yale L.J. 1111, 1133-34 (1974). Berger made this point as part of an argument that punishment of the President should not be left to Congress, essentially because Congress cannot be trusted. Whether Berger is right depends, of course, on what Congress is being “trusted” to do. If the system is a political one—if it is standardless—then Berger’s argument loses its force. Congress is after all a political body and, under this Article’s view of the system, choosing whether to punish the President is a political act.
gress might abandon him. Even a popular President may be toppled by the mass defection of supporters. This danger will lurk in the shadowy recesses of the President's mind, forcing him to glance over his shoulder as he embarks on a course he knows to be wrongful. The further down the road he goes, the larger the danger will loom. At some point, fear should stop him. As Elbridge Gerry remarked during the drafting of the Constitution, "A good magistrate will not fear [impeachments]. A bad one ought to be kept in fear of them." Of course the threat of catastrophe may not stop the President. It apparently did not stop Richard Nixon. But that is why the threat is capable of execution. If the fear of impeachment is not sufficient, then its reality should bring even the most abusive Presidency to a close.

The end of a Presidency may bring but little relief to the individual who believes himself wronged by the President, and seeks damages from him. Yet under the rule established in *Nixon v. Fitzgerald*, the President need not make the individual whole. Does this rule mean that there are indeed some rights for whose violation the law affords no remedy? This question must be rephrased before it can be answered. Proponents of civil damages liability have consistently asserted that the number of "serious" lawsuits the President would have to face is small. This assertion necessarily implies, the litigiousness of our society being what it is (*ubi jus, ibi lawsuit*), that the number of individuals with serious grievances would also be small. So the real question is whether in a handful of cases, there will be violations of right for which there will be no remedy.

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212 2 Records, *supra* note 75, at 66.
213 Blackstone's traditional formulation, echoed by Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) held that a "right" without a "remedy" is not worthy of the same. As will shortly be seen, a proper understanding of *Nixon v. Fitzgerald* does not require disputing these venerable precedents.
214 Professor Schuck's work in the field suggests that this assumption may be challenged on two grounds, accuracy and relevance. The challenge to the assumption's accuracy accepts the contention that only a handful of lawsuits have been filed against Presidents and former Presidents based on their conduct while in office, but notes that had the Court reached the opposite result in *Nixon v. Fitzgerald* the decision might have been read a broad invitation to those with grievances to come forward and sue. After all, since the Court handed down its decision in *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971), the number of civil damages actions against federal officials has increased dramatically. *See P. Schuck, supra* note 29, at 199-202. Whether these suits are meritorious is irrelevant; the important point is that they exist.

The challenge to the assumption's relevance disputes the contention that because an "objective" standard (what a reasonable person would have understood) is applied, and because the Justice Department will provide defense for those sued in their official capacity, frivolous actions will be dismissed on the pleadings at virtually no cost to the defendant. Professor Schuck suggests that the cost to the defendant can prove quite substantial, even if not in money. *Id.* at 114-62.
A "yes" answer would not be difficult to defend, because the rules of any forum may be sufficiently strict to stifle some claims for relief. There is no reason to expect special treatment for victims of presidential wrongs. The right answer, however, is "no," for a reason that should be plain. An individual wronged by presidential order is not without a damages remedy; he will ultimately be made whole. He is only without the defendant of his choice. The President does not act alone. In this sense, he is analogous to the British monarch who, some delegates pointed out during the ratification debates, cannot carry out any act without the assistance of aides, who may be punished.\textsuperscript{215} If any individual is harmed by presidential decree, he may sue all the functionaries below the Chief Executive in the chain of command from order to act.

The lesser functionaries may be held liable because the Supreme Court has extended to them its common law implied cause of action.\textsuperscript{216} The best rationale for their liability, however, is not the need for awarding damages to an injured party, but the need to provide adequate checks on official malfeasance. The existence of civil damages actions against presidential aides is a useful by-product of the decision in \textit{Harlow v. Fitzgerald}, but the desirability of providing a remedy for the wronged individual is not a sufficient justification for the holding. Under the analysis presented in this essay, \textit{Harlow v. Fitzgerald} was correctly decided only if this additional check is necessary to maintain the balance of powers.

The best argument for the necessity of this check is that although the Constitution establishes a framework for punishment and control of

\textsuperscript{215} This comparison to the British monarchy was used two ways. For James Iredell, speaking in the North Carolina ratification convention, the distinction between the Crown and the President was an argument in favor of ratification. The King was presumed to do no wrong, and his adviser would be punished in his stead. The President, "[i]f he commits any misdemeanor in office, . . . is impeachable, removable from office, and incapacitated to hold any office of honor, trust, or profit. If he commits any crime, he is punishable by the laws of his country, and in capital cases may be deprived of his life." \textit{4 Debates, supra} note 83, at 109. For Gouverneur Morris, in the Philadelphia Convention, this same distinction was (until he changed his mind) an argument against the necessity for impeachment: "[The President] can do no criminal act without Coadjutors who may be punished. In case he should be re-elected, that will be sufficient proof of his innocence." \textit{2 Records, supra} note 75, at 64.

\textsuperscript{216} The Court held that the so-called "objective standard" applies to these cases. The application of this standard means that if the defendant can show that he acted as a reasonable person would have under the circumstances, the plaintiff will probably recover nothing. \textit{See supra} note 140 and accompanying text. That result is a function of the standard of liability and has nothing to do with whether the plaintiff can \textit{seek} to be made whole. A damages action for official misconduct is like any other damages action: when the defendant has an adequate defense, the plaintiff, injured or not, will recover nothing.
an evil President, it does not do the same with respect to lower federal officials.\footnote{217} Thus, civil damages liability for the lower officials does not constitute a fresh check in the same way that similar liability for the President would constitute one. The constitutional system of separated and balanced powers is designed to keep in check the President himself, not his aides. That same system is adequate for preserving a congressional role in the making of policy, which is why \textit{Chadha} was rightly decided. Legislative vetoes and civil damages liability of the President would upset the delicately crafted system. With respect to the President’s aides, however, there is no delicately crafted system to upset.\footnote{218} Thus, civil damages liability for lower executive-branch functionaries is arguably necessary to preserve the balance of powers. Happily, the remedy has the advantage of making whole those who have been damaged by executive action.\footnote{219}

The issue, then, is not really whether a remedy exists, but only whether the President is to be among those against whom the remedy will run. Resolution of that issue has nothing to do with setting right a wrong and everything to do with the balance of powers.\footnote{220}

\footnote{217} In particular (although this argument can be taken too far), the constitutional structure provides evidence that the Framers did not anticipate the massive growth in the power and responsibility of the executive branch. The Framers came to the Constitution from the experience of the Articles of Confederation, which created no executive branch. Although the desire to create a strong executive did much to motivate the call for a new Constitution, see generally G. Wood, \textit{supra} note 71, at 393-429, it would be counterhistorical to assume that the executive branch as it exists today is the one that the Framers anticipated. This justification may not be the most effective one for the result in \textit{Harlow v. Fitzgerald}, but it is the type of argument that must be made if the case is to be explained under the theory advanced in this essay. The alternative is the one advocated by the Chief Justice in his dissent in \textit{Harlow v. Fitzgerald} to wit, that the case was wrongly decided. But it is far easier to show that presidential assistants are unlike the functionaries sued in the cases he cites, see \textit{supra} note 117, than to show that they are like the President.

\footnote{218} Those who consider the original understanding may find significance in the apparent belief of some of the Framers that a civil damages action would lie against the President’s aides. See, e.g., 4 \textit{Debates}, \textit{supra} note 83, at 46-48 (A. Maclaine) (discussing suit against inferior officer who abuses authority); 2 \textit{Records}, \textit{supra} note 75, at 64 (G. Morris) (President’s aides “may be punished,” at least for criminal acts).

\footnote{219} When no assistants are available as defendants, the President must have acted alone. The gist of Professor Freund’s argument, quoted \textit{supra} note 114, is that when the President acts alone, he may be susceptible to judicial process.

\footnote{220} Presidential immunity might also help to balance powers in a slightly different sense, one suggested to me by Robert Cover. The tradition that a former President will not be held to account for his conduct in office may underlie another tradition, one that Americans take for granted. This is the tradition of smooth and nonviolent transfers of power from one administration to the next. In many other societies, where former heads of government are frequently tried and punished for their “abuses” of power, the premiers spend large parts of their terms searching for ways to cling to authority—or to protect themselves when they finally leave office. Their efforts may include compiling information on political opponents to purchase a safer retirement; the arrest or assassi-
IV. Conclusion

The journey has been a little long, but in the end, the outcome in the presidential immunity case turns out not to be so startling.\textsuperscript{221} The decision conforms to tradition and to intuition. Constitutional tradition holds that the courts declare what the law is, and nothing in the case prevents them from doing that. Intuition suggests that the President is not above the law, and nothing in the decision places him there. That leaves the question of who decides what should happen when the President chooses not to do what the courts decree. In a political system, that is a political question. If \textit{Nixon v. Fitzgerald} makes a statement about constitutional law, the statement is probably that absent extraordinary necessity, it is for the political actors in the system—members of Congress and the voting public—to deal with presidential misconduct.

This theory reflects a view of the Constitution as a political as well as a legal document and a view of the federal government as the proper province not only of the courts but of the other branches as well. It would be all too easy to leave every issue arising under the Constitution to judicial resolution, but \textit{Nixon v. Fitzgerald} is a subtle reminder that the courts cannot govern alone—and that the system’s political actors should not want them to. In this sense, the presidential immunity decision may be viewed as a kind of call to action. If there is a prevailing view that the presidency is getting out of hand, then the time has come for the government’s potentially most powerful branch to resume supremacy. The power to make law includes the power to punish and rests mainly with the legislature. The legislature does not do its job unless it is willing to legislate, to reach decisions, to set policy. These are the tasks that a Congress that governs ought to be performing. Every day that it does less—that the voters do not force it to do more—it is acquiescing in a shift of power to the executive branch. Congressional weakness, because it threatens to upset the balance of power, results in calls for extra-constitutional remedies. Those extra-

\textsuperscript{221} To say that the result is not startling is not to approve the reasoning process through which the majority reached it. One may appreciate the essence of a thing without liking all of its form. A reader may say of \textit{Nixon v. Fitzgerald} much the same thing that Mikhail Botvinnik, then chess champion of the world, said of a game he contested with Bobby Fischer, then a teenaged prodigy. The game was complex and exciting and hopelessly flawed, leading the world champion to comment later on: “‘Too many mistakes?’ the reader may justly ask. Yes, there were rather a lot!” B. FISCHER, \textit{MY SIXTY MEMORABLE GAMES} 253 (1969) (quoting Mikhail Botvinnik).
constitutional remedies, however, might in turn destroy the balanced system they are meant to preserve.

The message of Nixon v. Fitzgerald appears to be that the Supreme Court will not in the absence of extraordinary necessity act to save Congress from its own weakness, to punish a President that the legislature is unable to control. It is up to the political actors to save themselves. If they do not, then the federal courts, sitting on the sidelines, might finally be forced to enter the game. By the time they do, however, it may be too late. If it is, then the other players will have only themselves to blame.