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Notes

AN EXAMINATION OF IMMUNITY FOR FEDERAL EXECUTIVE OFFICIALS

I. INTRODUCTION

In 1982, the United States Supreme Court decided the companion cases of *Nixon v. Fitzgerald*¹ and *Harlow v. Fitzgerald*.² These decisions highlight a long and often inconsistent historical development of immunity for public officials. The doctrine of governmental immunity has received not only substantial judicial attention³ but also scholarly commentary.⁴

1. 102 S. Ct. 2690 (1982). For a further discussion of *Nixon*, see notes 80-86 and accompanying text *infra*.

2. 102 S. Ct. 2727 (1982). For a further discussion of *Harlow*, see notes 81-101 and accompanying text *infra*.

3. See, e.g., *Nixon*, 102 S. Ct. at 2690 (President of the United States); *Harlow*, 102 S. Ct. at 2727 (presidential aides); *Butz v. Economou*, 438 U.S. 478 (1978) (Cabinet); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (Prosecutors); *Wood v. Strickland*, 420 U.S. 308 (1975) (school administrators); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (Governor); *Doe v. McMillan*, 412 U.S. 306 (1973) (Congress); *Gravel v. United States*, 408 U.S. 606 (1972) (congressional aides); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (federal agents); *Powell v. McCormick*, 395 U.S. 486 (1969) (congressional employees); *Pierson v. Ray*, 386 U.S. 547 (1967) (state judges); *United States v. Johnson*, 383 U.S. 169 (1966) (members of Congress); *Barr v. Matteo*, 360 U.S. 564 (1959) (lower federal officials); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (state legislators); *Spalding v. Vilas*, 161 U.S. 483 (1896) (Postmaster General); *Kilbourn v. Thompson*, 103 U.S. 168 (1880) (Congress); *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), *aff'd by an equally divided vote*, 452 U.S. 713 (1981) (President, Cabinet, Presidential Aides); *Forsyth v. Kleindienst*, 599 F.2d 1203 (3d Cir. 1979), *cert. denied*, 453 U.S. 913 (1981) (Attorney General); *Peterson v. Weinberger*, 508 F.2d 45 (5th Cir.), *cert. denied*, 423 U.S. 830 (1975) (Secretary of Health, Education and Welfare).

4. See Becht, *The Absolute Privilege of the Executive in Defamation*, 15 VAND. L. REV. 1127 (1962); Casto, *Barr v. Matteo and the Problem of Coequal Protection for State and Federal Officials*, 13 TULSA L.J. 195 (1977) [hereinafter cited as Casto, *Coequal Protection*]; Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 SUFFOLK U.L. REV. 1 (1968) [hereinafter cited as Cella, *Legislative Privilege*]; Davis, *Administrative Officers' Tort Liability*, 55 MICH. L. REV. 201 (1956); Engdahl, *Immunity and Accountability for Positive Government Wrongs*, 44 U. COLO. L. REV. 1 (1972-73); Gray, *Private Wrongs of Public Servants*, 47 CALIF. L. REV. 303 (1959); Handler & Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 HARV. L. REV. 44 (1960); Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963); Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937); Oppenheim, *Congressional Free Speech*, 8 LOY. L. REV. 1 (1955-56); Suarez, *Congressional Immunity: A Criticism of Existing Distinctions and a Proposal for a New Definitional Approach*, 20 VILL. L. REV. 97 (1974) [hereinafter cited as Suarez, *Congressional Immunity*]; Schuck, *Suiting Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281; Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning, and Scope*, 99 U. PA. L. REV. 960 (1951); Comment, *Brewster, Gravel, and Legislative Immunity*, 73 COLUM. L. REV. 125 (1973); Comment, *Accounta-*

Misconduct on the part of public officials has been a concern underlying our democratic system since the founding of our nation, but no more so than in the years following the Vietnam War and the Watergate scandal. Policy decisions, and other discretionary acts of public officials, once so freely accepted by the electorate, are now more closely scrutinized, analyzed and hence, criticized by the media, the public and, in particular, the courts.

Immunity from suit for government officials has its origins in the common law doctrine of sovereign immunity, which was premised on the belief that "the King can do no wrong."⁵ The concept of official protection arose from a concern that public officers should be able to carry out their duties freely, without fear of potentially disabling threats of liability arising from their actions.⁶

The immunity doctrine has evolved into two forms of protection: absolute immunity and qualified immunity.⁷ Whereas absolute immunity acts as a total bar to any private cause of action, qualified immunity must be pleaded as an affirmative defense.⁸ Procedurally, a private suit against a government official entitled to absolute immunity is defeated by a motion to dismiss at the pleading stage provided that the official's actions were within the "scope of the immunity."⁹ On the other hand, those officials afforded only a qualified immunity from suit in the exercise of their discretionary function must factually demonstrate to the court that their conduct did not violate any statutory or constitutional right of "which a reasonable person would have known."¹⁰

bility for Government Misconduct: Limiting Qualified Immunity and the Good Faith Defense, 49 TEMP. L.Q. 938 (1976); Comment, *Economou v. United States Department of Agriculture: Blurring the Distinction Between Constitutional and Common Law Tort Immunity*, 18 WM. & MARY L. REV. 628 (1977) [hereinafter cited as Comment, *Economou v. United States*].

5. Gray, *Private Wrongs of Public Servants*, *supra* note 4, at 305. The maxim still holds true in Great Britain where the Monarch is absolutely immune from civil suit for personal torts. *Id.* at 307. *See also* 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 515-18 (2d ed. 1898).

6. *See Nixon*, 102 S. Ct. at 2708-09; *Harlow*, 102 S. Ct. at 2732; *United States v. Johnson*, 383 U.S. 169, 180-82 (1966); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871).

7. *Harlow*, 102 S. Ct. at 2732-33.

8. *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976). Absolute immunity defeats a suit at the pre-trial level, so long as the official's alleged infractions were within the scope of the immunity. *Id.* The availability of qualified immunity is determined by the evidence at trial, which includes an examination of the official's actions and motivations. *Id.* *See also* *Wood v. Strickland*, 420 U.S. 308, 320-22 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 238-239 (1974); *Burkhart v. Saxbe*, 397 F. Supp. 499, 502 (E.D. Pa. 1975).

9. *Imbler v. Pachtman*, 424 U.S. 409, 419 n. 13 (1976) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 238-39 (1974); *Wood v. Strickland*, 420 U.S. 308, 320-322 (1975)).

10. 102 S. Ct. at 2738. At one time, the Court required an analysis of the subjective motivation of the official as a prerequisite to extending qualified immunity. *See, e.g.*, *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976). The Court has deter-

This note will examine the historical development of the immunity doctrine for public officials in the judicial, legislative and executive branches of the federal government, with particular emphasis on the protection accorded members of the executive branch. Further, it will discuss and analyze the Supreme Court's inconsistent and inequitable application of both absolute immunity and qualified immunity to the actions of various government officials.

II. JUDICIAL IMMUNITY

Federal and state judges have traditionally enjoyed absolute immunity from suit.¹¹ Judicial immunity is not a constitutionally-derived protection, but one which has its roots in the common law.¹² It arose out of the concern that judicial officers should be free to act without apprehension of personal liability for the consequences of their actions.¹³ The immunity afforded to

mined that the costs attendant to a subjective inquiry into the motive of an official's actions far outweigh its usefulness:

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.

Harlow, 102 S. Ct. at 2738 n.29 (quoting *Halperin v. Kissinger*, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gessell, J., concurring), *aff'd by an equally divided vote*, 452 U.S. 713 (1981)). *See also* *Procunier v. Navarette*, 434 U.S. 555, 565 (1978); *Wood v. Strickland*, 420 U.S. 308, 321 (1975). For a discussion of *Harlow*, see notes 81-101 and accompanying text *infra*.

11. *See* *Stump v. Sparkman*, 435 U.S. 349 (1978); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871). One commentator has observed that, "[t]he judge has truly been the pampered child of the law, for he is among those privileged few who are allowed to fulfill their duties not only stupidly, or negligently but wilfully, maliciously, corruptly or just plain dishonestly, yet escape liability to those damaged by his conduct." Gray, *Private Wrongs of Public Servants*, *supra* note 4, at 309 (footnote omitted).

12. *See* *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871); Casto, *Coequal Protection*, *supra* note 4, at 204-05. Immunity for judges is an outgrowth of the absolute immunity granted to the King of England. "Since the King could do no wrong, his personal delegates, the judges, to whom he had entrusted the dispensing of justice throughout the realm 'ought not to be drawn into question for any supposed corruption [for this tends] to slander the justice of the King'." Gray, *Private Wrongs of Public Servants*, *supra* note 4, at 311 (quoting *Floyd v. Barker*, 12 Co. Rep. 23, 25, 77 Eng. Rep. 1305, 1307 (Star Chamber 1607)).

13. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871). In *Bradley*, an attorney sued a District of Columbia judge for having him disbarred from practice before the supreme court of the district. *Id.* at 336-37. In holding that the judge was absolutely immune from suit, the United States Supreme Court reasoned,

[I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.

judges acts as a shield from civil damage suits¹⁴ and from actions under 42 U.S.C. § 1983.¹⁵ This insulation from liability applies to judicial actions

Id. at 347. Otherwise, as another court has noted, "No man but a beggar, or a fool, would be a Judge." *Miller v. Hope*, 2 Shaw Scot. App. 125, 135 (H.L. 1824).

One commentator has suggested several policy reasons why judges are afforded such a broad immunity from suit: (1) saving judges' time; (2) preventing influences on decisions through fear or subsequent suit; (3) removing a discouragement to judicial service; (4) separation of powers; (5) necessity of finality; (6) other opportunities for review of adverse decisions; (7) duty lying to public only, not individuals; (8) judicial self-protection; and (9) unfairness in penalizing honest error. Jennings, *Tort Liability of Administrative Officers*, *supra* note 4, at 271-72. Despite the apparent completeness of the underlying rationale for absolute immunity for judges that this list suggests, it has been criticized as not being "truly satisfactory" as an explanation of "why a person alleging injury by a corrupt act should be barred from compensation without any consideration on the merits of the case." *See Gray, Private Wrongs of Public Servants*, *supra* note 4, at 310.

14. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871). The Court stated that, "the defendant cannot be subjected to responsibility for it in a civil action, however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." *Id.*

15. *Pierson v. Ray*, 386 U.S. 547 (1967). Section 1983 provides a remedy for deprivation of "any rights, privileges or immunities secured by the Constitution and laws. . . ." 42 U.S.C. § 1983 (1982).

The circuit courts, however, are in disagreement over whether judicial immunity insulates judges from declaratory or injunctive relief with respect to their judicial acts in suits brought under § 1983. The Second, Fourth and Seventh Circuits have held that judicial immunity does *not* extend to declaratory relief. *See Heimbach v. Village of Lyons*, 597 F.2d 344, 347 (2nd Cir. 1979); *Harris v. Harvey*, 605 F.2d 330, 335 n.7 (7th Cir. 1979); *Hansen v. Ahlgrimm*, 502 F.2d 768, 769 (7th Cir. 1975); *Zimmerman v. Brown*, 528 F.2d 811, 814 (4th Cir. 1975); *Fowler v. Alexander*, 478 F.2d 694, 696 (4th Cir., 1973). On the other hand, the Court of Appeals for the Eighth, Ninth and District of Columbia Circuits are of the view that judicial immunity does extend to declaratory and injunctive relief. *See Kelsey v. Fitzgerald*, 574 F.2d 443, 444 (8th Cir. 1978); *Shipp v. Todd*, 568 F.2d 133, 134 (9th Cir. 1978); *Briggs v. Goodwin*, 569 F.2d 10, 15 & n.4 (D.C. Cir. 1977); *Williams v. Williams*, 532 F.2d 120, 121-22 (8th Cir. 1976).

The Supreme Court has granted certiorari to consider whether judicial officials are absolutely immune from an award of attorneys fees under 42 U.S.C. § 1988, in § 1983 actions against them seeking declaratory and injunctive relief. *Allen v. Burke*, 690 F.2d 376 (4th Cir. 1982), *cert. granted*, *Pulliam v. Allen*, No. 82-1432 (April 25, 1983). In *Allen*, Richmond Allen was arrested for using abusive language, a misdemeanor not punishable by incarceration under Virginia law. *Id.* at 377. A magistrate incarcerated Allen until his trial fourteen days later because he was unable to meet bail. *Id.* Allen subsequently brought suit under 42 U.S.C. § 1983 against the magistrate and the trial judge, seeking both declaratory and injunctive relief. *Id.* The district court found that the incarceration of Allen was unconstitutional and granted the injunction. *Id.* Allen subsequently filed a request for attorney fees and costs pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982). *Id.* at 378. The district court awarded the requested fees. *Id.* In affirming the court's decision, the Fourth Circuit held that although judicial officials are absolutely immune from liability for money damages, this immunity does not extend to injunctive and declaratory relief under 42 U.S.C. § 1983. *Id.* (citations omitted). *See also* *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 738-39 (1980) (attorney fees may be recovered against an official under § 1988 when prospective relief is properly awarded against the officials); *Hutto v. Finney*, 427 U.S.

even in the face of allegation of malicious motivation.¹⁶ There are, however, limits to this immunity. First, the privilege extends only to acts performed in a judicial capacity.¹⁷ Second, the immunity is not available to judicial actions where there is a clear absence of jurisdiction over the subject-matter.¹⁸

The absolute immunity extended to the judicial branch of government is not confined to judges. The Supreme Court has derivatively extended absolute immunity to judicial and quasi-judicial officers of the court, including prosecutors,¹⁹ jurors,²⁰ and bodies exercising adjudicatory functions.²¹

III. LEGISLATIVE IMMUNITY

Article I, Section 6, of the United States Constitution provides, "The Senators and Representatives . . . shall be *privileged* from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."²² With this foundation, the

678, 694 (1978) (in an action under § 1983, a court may allow the prevailing party, other than the United States, reasonable attorney fees as part of the costs).

16. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871). The *Bradley* Court observed that the "allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence." *Id.* at 354.

17. *Id.* at 351. See Gray, *Private Wrongs of Public Servants*, *supra* note 4, at 309. The factors determining whether a judicial act falls within the immunity include an examination of the "nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Stump v. Sparkman*, 435 U.S. 349, 362 (1978).

18. See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1871). Judges are not liable for acts which are simply in excess of their jurisdiction. *Id.*

19. See *Imbler v. Pachtman*, 424 U.S. 409, 422-24 (1976); *Forsyth v. Kleindienst*, 599 F.2d 1203, 1211-14 (3d Cir. 1979). In *Imbler*, the Court likened the role of prosecutors to that of judges and grand-jurors and granted the state prosecuting attorney absolute immunity. 424 U.S. at 420-21. Moreover, the Court reasoned that if the law gave only a qualified immunity to the prosecutor, the threat of section 1983 and common-law suits would undermine performance of his duties. *Id.* at 424. Moreover, the public trust in the prosecutor's office would suffer and an adverse effect on the functioning of the criminal justice system would result. *Id.* at 424, 426. However, although the *Imbler* Court held that a prosecutor was absolutely immune from suit while initiating and presenting a case, it left the door open as to whether this form of immunity would extend to his administrative or investigative duties. *Id.* at 430-31.

20. See *Cawley v. Warren*, 216 F.2d 74 (7th Cir. 1954); *Dunham v. Powers*, 42 Vt. 1 (1869).

21. See *Adair v. Bank of America*, 303 U.S. 350 (1938) (bankruptcy commissioners); *Jones v. Kennedy*, 121 F.2d 40 (D.C. Cir.), *cert. denied*, 314 U.S. 665 (1941) (Securities and Exchange Commission); *Wilson v. Hirst*, 67 Ariz. 197, 193 P.2d 461 (1948) (state hospital boards).

22. U.S. CONST. art. I, § 6, cl. 2 (emphasis added). The speech or debate clause is almost identical to the English Bill of Rights of 1689, which provides "[t]hat the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." *United States v.*

Supreme Court has traditionally extended absolute immunity from suit to both federal and state legislators with respect to activities performed within the scope of their legislative duties.²³ The grant of absolute immunity is not confined to legislative "debate," but encompasses any legislative-related activity, including committee investigations, reports and voting.²⁴ The policy behind the grant of absolute immunity to legislators is premised on a belief that lawmakers need protection from a potentially intimidating and hostile executive and judiciary.²⁵

Although such absolute protection was originally limited to elected legislators,²⁶ in 1972, the Supreme Court in *Gravel v. United States*,²⁷ derivatively

Johnson, 383 U.S. 169, 178 (1966) (quoting Bill of Rights of 1869, 1 W. & M., Sess. 2, c.2).

23. See *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Doe v. McMillan*, 412 U.S. 306 (1973); *Gravel v. United States*, 408 U.S. 606 (1972); *United States v. Brewster*, 408 U.S. 501 (1972); *United States v. Johnson*, 383 U.S. 169 (1966); *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Kilbourn v. Thompson*, 103 U.S. 168 (1880).

One commentator has noted that there are three elements to legislative immunity: (1) "freedom from being questioned in court for anything said in debates or proceedings of the legislature"; (2) "privilege attached to certain acts which would amount to trespass to the person if done apart from the" legislature; and (3) a directive to courts barring inquiry into motives of the legislator in passing legislation and use of these motives as a basis for liability. Gray, *Private Wrongs of Public Servants*, *supra* note 4, at 319.

24. See *Gravel v. United States*, 408 U.S. 606 (1972); *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Kilbourn v. Thompson*, 103 U.S. 168 (1880).

25. See *United States v. Johnson*, 383 U.S. 169, 181 (1966). See also *Tenney v. Brandhove*, 341 U.S. 367 (1951). In *Tenney*, the Court, in determining that state legislators are entitled to absolute immunity, reasoned that immunity should be afforded "not for their private indulgence but for the public good." *Id.* at 377. One commentator has elaborated on this point:

It is important to both an understanding and appreciation of this freedom from accountability of legislators to bear in mind that legislative immunity is not the personal privilege or perquisite of office of the elected representative. Rather, it is intended to serve the interests of the electors—the people whose votes send a man or woman to Congress for the purpose of representing them The guarantee of that independent representation . . . is denied when the elected representative is subject to "prosecution by an unfriendly executive and conviction by a hostile judiciary" for an act undertaken in the discharge of his legislative duties.

Suarez, *Congressional Immunity*, *supra* note 4, at 98 (footnotes omitted). Moreover, it has been suggested that the remedy for legislative abuse lies with the electorate. *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951). In *Tenney*, the Court noted that the "[c]ourts are not the place for such controversies," rather "[s]elf-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses." *Id.*

For a review of the history and policy development of the speech or debate clause and legislative immunity, see Cella, *Legislative Privilege*, *supra* note 4; Gray, *Private Wrongs of Public Servants*, *supra* note 4; Oppenheim, *Congressional Free Speech*, *supra* note 4; Suarez, *Congressional Immunity*, *supra* note 4; Yankwich, *The Immunity of Congressional Speech—Its Origins, Meaning, and Scope*, *supra* note 4; Comment, *Brewster, Gravel, and Legislative Immunity*, *supra* note 4.

26. See *Powell v. McCormick*, 395 U.S. 486 (1969) (clerk and doorkeeper not afforded absolute immunity under speech or debate clause); *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (committee counsel immunity less absolute than for legislator); *Kilbourn v. Thompson*, 103 U.S. 168 (1880) (Sergeant-at-Arms not immune

extended absolute immunity to legislative aides.²⁸ In *Gravel*, an aide to United States Senator Mike Gravel²⁹ was subpoenaed to testify before a grand jury to determine possible criminal conduct surrounding the release and publication in the *Congressional Record* of a classified Defense Department study, popularly known as the *Pentagon Papers*.³⁰ In holding that the speech or debate clause applies not only to the legislator, but also derivatively to legislative aides, the *Gravel* Court utilized a “functional” approach to immunity.³¹ The Court reasoned 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”³² The Court’s extension of absolute immunity to leg-

from suit). For a discussion of these cases and a comparison with *Gravel v. United States*, 408 U.S. 606 (1972), see notes 27-34, *infra*.

27. 408 U.S. 606 (1972).

28. *Id.* at 616.

29. Senator Mike Gravel (D.-Alaska), Chairman of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee, read extensively into the record a copy of the *Pentagon Papers*. 408 U.S. at 609. Gravel’s aide performed duties pursuant to the Senator’s role as chairman of this Committee. *Id.*

30. *Id.* at 608. Senator Gravel, as intervenor, asserted that his privilege under the speech or debate clause would be violated should his aide be permitted to testify before the grand jury. *Id.* at 609.

31. *Id.* at 618. The *Gravel* Court ruled that the speech or debate clause did not immunize an aide from testifying before a grand jury about possible criminal conduct if such an inquiry “proves relevant to investigating possible third-party crime. . . .” *Id.* at 629. Moreover, it stated that the immunity for legislative aides did not extend to nonlegislative acts, even if these duties were in their official capacity. *Id.* at 625.

The *Gravel* Court factually distinguished the case *sub judice* from its earlier holdings. *Id.* at 618 (citing *Powell v. McCormick*, 395 U.S. 486 (1969) (clerk and doorkeeper carrying out directions protected by speech or debate clause); *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (committee counsel gathering information for hearing); *Kilbourn v. Thompson*, 103 U.S. 168 (1880) (Sergeant-at-Arms executing a legislative order)). In these earlier cases, the Court had denied the derivative extension of the speech or debate immunity to legislative aides and employees. *Id.* at 618-21. The Court held that these decisions did not set forth a prohibition against persons other than members of Congress being beyond the scope of the protection of the speech or debate clause. *Id.* at 618. Rather, the Court noted that in those cases, the aides were carrying out prohibited activities not entitled to speech or debate clause protection because no threat to legislative independence was posed. *Id.* at 620-21. The cases did not stand for the proposition that immunity was unavailable to congressional or committee employees because they were not members of Congress. *Id.* at 620. On the contrary, an extension of the clause in *Kilbourn*, *Eastland* and *Powell* would have privileged “illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings.” *Id.*

32. *Id.* at 616-17. The *Gravel* Court concluded that if legislative aides “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.” *Id.* at 617 (citing *United States v. Johnson*, 383 U.S. 169, 181 (1966)).

In applying a “functional” approach to the extension of the absolute immunity, the *Gravel* Court embraced the analysis utilized in *Barr v. Matteo*. *Id.* at 617 (citing 360 U.S. 564 (1959)). In *Barr*, the Supreme Court extended absolute immunity to federal executive officials below the rank of cabinet member. *Barr v. Matteo*, 360

islative aides, although justified by a strained reading of the speech or debate clause,³³ is actually premised on a public policy view that, as an extension of the legislator, legislative aides need similar independence and, thus, protection from suit.³⁴ This logic is consistent with the Court's derivative extension of absolute immunity from judges to judicial and quasi-judicial officials.³⁵

IV. EXECUTIVE IMMUNITY

Immunity for federal executive officials has its origins at common law.³⁶ Initially, absolute immunity from suit was afforded to federal executive officials against common law tort claims.³⁷ The cornerstone of this doctrine was laid in the 1896 case of *Spalding v. Vilas*.³⁸ In *Spalding*, the Postmaster General was sued for malicious defamation.³⁹ The Supreme Court held that the head of an executive department was absolutely immune from suit for actions within the ambit of his control or supervision.⁴⁰ The Court reasoned that to hold otherwise would cripple effective public administration by the

U.S. 564, 572-73 (1959). The Court reasoned in *Barr* that it was not the status, but the functional role of the individual, that determines the immunity afforded. *Id.* For a discussion of *Barr*, see notes 42-45 and accompanying text *infra*.

33. 408 U.S. at 621-22.

34. *See id.* at 616-17.

35. For a discussion of judicial immunity, see notes 12-22 and accompanying text *supra*. For additional analysis of the *Gravel* decision, see Suarez, *Congressional Immunity*, *supra* note 4.

36. *See Spalding v. Vilas*, 161 U.S. 483, 498 (1896). For a discussion of the common law development of executive immunity, see Engdahl, *Immunity and Accountability for Positive Government Wrongs*, *supra* note 4; Gray, *Private Wrongs of Public Servants*, *supra* note 4; Comment, *Executive Immunity*, 19 HOUS. L. REV. 299 (1982); Comment, *Economou v. United States*, *supra* note 4. Unlike the legislative and judicial branches, however, the rationale for executive immunity lacks a clear historical or constitutional foundation and, thus, is largely an extension of judicial immunity. Comment, *Economou v. United States*, *supra* note 4 at 631-32.

37. *See, e.g.*, *Barr v. Matteo*, 360 U.S. 564 (1959); *Spalding v. Vilas*, 161 U.S. 483 (1896); *Papagianakis v. The Samos*, 186 F.2d 257 (4th Cir. 1950), *cert. denied*, 341 U.S. 921 (1951); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950); *Gibson v. Reynolds*, 172 F.2d 95 (8th Cir.), *cert. denied*, 337 U.S. 925 (1949); *Glass v. Ickes*, 117 F.2d 273 (D.C. Cir. 1940).

38. 161 U.S. 483 (1896).

39. *Id.* at 486. The Postmaster General at that time was accorded Cabinet-level rank. *Id.* at 498. In *Spalding*, the claimant alleged that the Postmaster General had circulated to postmasters false information to induce them to breach their contracts with the plaintiff. *Id.* at 486.

40. *Id.* at 498. The *Spalding* Court relied on the rationale used in affording absolute immunity to judges in the extension of this immunity to executive officials:

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.

Id.

executive branch of government.⁴¹

Absolute immunity from tort claims was extended to lower level federal officials in *Barr v. Matteo*.⁴² In *Barr*, the Acting Director of the Office of Rent Stabilizations was sued for libel resulting from the issuance of a press release.⁴³ The Court, applying a "functional" approach, granted total immunity to the official.⁴⁴ The *Barr* Court premised its holding on the policy that "[i]t is *not* the title of his office but the duties with which the particular officer . . . is entrusted" which governs the type of immunity afforded the official.⁴⁵

Contemporaneous with its consideration of whether absolute immunity should be accorded to federal executive officials for tortious conduct, the Court considered whether immunity should be extended to executive officials for conduct that allegedly violates an individual's constitutional rights. Federal litigation alleging constitutional violations by state officials arises under 42 U.S.C. § 1983.⁴⁶ Although seldom invoked prior to 1961,⁴⁷ the

41. *Id.* The Court also reasoned that "[t]he interests of the people require that due protection be accorded to them in respect of their official acts." *Id.* Moreover, the Court held that the personal motive of the official is immaterial. *Id.* at 498-99.

42. 360 U.S. 564 (1959).

43. *Id.* at 565.

44. *Id.* The Court stated that "[t]he privilege is not a badge of emolument of exalted office, but an expression of policy designed to aid in the effective functioning of government." *Id.* at 572-73. The *Barr* Court did recognize, however, that the acts of the head of an executive department are afforded a broader protection than those functions performed by an officer of lesser rank. *Id.* at 573. Moreover, "the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails." *Id.*

45. *Id.* (emphasis added). The *Barr* Court, relying on the policy espoused in *Spalding*, reasoned that executive officials should be free to carry out their duties "unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—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." *Id.* at 571. The Court further relied on the "functional" approach of *Spalding*, noting that government activities have become so complex as to necessitate a delegation and redelegation of authority as to many functions, which do not become "less important simply because they are exercised by officers of lower rank in the executive heirarchy." *Id.* at 573.

In the interim between *Spalding* and *Barr*, many of the lower federal courts had already extended absolute immunity from tort actions to lower federal executive officials. See *Papagianakis v. The Samos*, 186 F.2d 257 (4th Cir. 1950), *cert. denied*, 341 U.S. 921 (1951) (immigration official—false imprisonment); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950) (Attorney-General and Director of the Enemy Alien Control Unit—false imprisonment); *Gibson v. Reynolds*, 172 F.2d 95 (8th Cir.), *cert. denied*, 337 U.S. 925 (1949) (draft misclassification); *Laughlin v. Rosenman*, 163 F.2d 838 (D.C. Cir. 1947) (Special Assistant to Attorney General—malicious prosecution); *Jones v. Kennedy*, 121 F.2d 40 (D.C. Cir.), *cert. denied* 314 U.S. 665 (1941) (Securities and Exchange Commission member—slander).

46. 42 U.S.C. § 1983 (1982). Section 1983 provides in pertinent part as follows: 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

Supreme Court raised the spectre of private litigation against state executive officials by giving an expansive interpretation to section 1983 in *Monroe v. Pape*.⁴⁸ In *Monroe*, a search and seizure case, the Court held that state officers were not absolutely immune from suit where federal rights were involved.⁴⁹ Further, after 1971 the Supreme Court and lower federal courts developed an equally broad cause of action against federal executive officers arising directly under the Constitution.⁵⁰

Although absolute immunity has been upheld for state judges⁵¹ and state legislators,⁵² the Court has afforded state executive officials only a qualified immunity from section 1983 suits.⁵³ In *Scheuer v. Rhodes*,⁵⁴ the Governor of Ohio and other Ohio state officials were sued under section 1983 for violating the constitutional rights of students killed by the National Guard during the 1970 anti-Vietnam War demonstrations at Kent State University.⁵⁵ The Supreme Court, departing from precedent established for federal executive officials in tort cases in *Spalding* and *Barr*,⁵⁶ held that state executive

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.

Id.

47. *Casto, Coequal Protection, supra* note 4, at 198 n.4.

48. 365 U.S. 167 (1961).

49. *Id.* at 187.

50. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). For a discussion of *Bivens*, see notes 63-65 and accompanying text *infra*. Since section 1983 applies only to officials acting under color of state law, it is not applicable to federal officials. As a result, the federal courts have developed a similar cause of action against federal officers arising directly under the Constitution. For a further discussion of this development, see *Casto, Coequal Protection, supra* note 4 at 197-200. *See also Dellinger, Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

51. *Pierson v. Ray*, 386 U.S. 547 (1967). The Court reasoned here, as it had in *Bradley*, that judges should be able to decide cases without fear from unsatisfied litigants. *Id.* at 554. For a discussion of absolute judicial immunity and common law actions, see notes 11-21 *supra*.

Prosecutors have also been given absolute immunity from section 1983 suits. *See Imbler v. Pachtman*, 424 U.S. 409 (1976). In *Imbler*, a state prosecutor was sued under section 1983 for allegedly using knowingly-false testimony and suppressing material evidence at plaintiff's trial. The Court held that prosecutors were absolutely immune. *Id.* at 430-31. The *Imbler* Court reasoned that the same considerations which underlie absolute protection for judges apply for prosecutors. *Id.* at 422-23. A qualified immunity, the Court concluded, would have an adverse effect on the functioning of the criminal justice system. *Id.* at 426 n.24.

52. *Tenney v. Brandhove*, 341 U.S. 367 (1951). The Court believed that extending absolute immunity from section 1983 actions was in harmony with the traditional immunity extended to legislators in common law suits. *Id.* at 379.

53. *See, e.g., Wood v. Strickland*, 420 U.S. 308 (1975); *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

54. 416 U.S. 232 (1974).

55. *Id.* at 243-49.

56. For a discussion of *Spalding* and *Barr*, see notes 38-45 and accompanying text *supra*.

officials would only be entitled to a qualified immunity provided that a "reasonable basis" and a "good faith" belief could be demonstrated for making the decision at issue.⁵⁷ The Court, also suggested that the "functional" approach used in common law claims against executive officials,⁵⁸ should apply in the section 1983 context, noting that the degree of qualified immunity available was dependent upon the decisionmaking responsibilities of the office.⁵⁹

The *Scheuer* Court's "good faith" immunity test was further developed in the 1974 case of *Wood v. Strickland*.⁶⁰ In *Wood*, a section 1983 suit was brought against school board members and state school administrators. The *Wood* Court held that the test to determine the availability of qualified immunity contains both a subjective and an objective element.⁶¹ There could be no immunity from suit if the official knew or should have known that he was violating one's constitutional rights *or* if the action was taken with malicious intention to deprive one of a constitutional right.⁶²

This objective/subjective standard adopted in *Wood* was later applied by the Court to suits brought against federal public officials for actions allegedly violating the claimant's constitutional rights. The availability of a cause of action in "constitutional tort" was first enunciated in 1971 in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.⁶³ In *Bivens*, six federal officers were sued for violating the claimant's fourth amendment

57. 416 U.S. at 247-48. Specifically, the Court stated that it is the "existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with a subjective good-faith belief, that affords a basis for qualified immunity." *Id.* The *Scheuer* Court reasoned that

[u]nder the criteria developed by precedents of this Court, § 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer have "the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government."

Id. at 248 (quoting *Sterling v. Constantine*, 287 U.S. 378, 397 (1932)). However, precedent does not suggest such a holding. *See Barr v. Matteo*, 360 U.S. at 564; *Spalding v. Vilas*, 161 U.S. at 483. The *Scheuer* Court applied with approval the "functional" analysis rationale set out in *Barr* in extending an immunity to officials, yet abandoned the extent of the immunity which was afforded in the latter case. 416 U.S. at 242, 247. The inconsistency between the holding in *Scheuer* and the holdings in *Barr* and *Spalding*, aside from the basic distinction between a common-law claim and a section 1983 action, has never been adequately addressed.

58. *See* notes 44-45 *supra*.

59. 416 U.S. at 247.

60. 420 U.S. 308 (1975).

61. *Id.* at 321. In *Wood*, plaintiffs had been expelled from school for violating a school regulation prohibiting the use of alcohol at school functions. *Id.* at 311. Thereupon, plaintiffs brought suit under section 1983 against school officials, alleging that their expulsion violated their rights to due process. *Id.* at 310.

62. *Id.* at 322. The Court said that "[a]ny lesser standard would deny much of the promise of § 1983." *Id.* *See also* *Procunier v. Navarette*, 434 U.S. 555 (1978); *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

63. 403 U.S. 388 (1971).

rights due to an illegal search and seizure.⁶⁴ The Court, reasoning that federal officers should be afforded no greater protection from suit under an action based in constitutional tort than that granted to state officials under section 1983, held that federal agents were entitled only to a qualified protection.⁶⁵

In light of these decisions, the Supreme Court, in *Butz v. Economou*,⁶⁶ examined the degree of immunity available to federal executives in an action based directly on the Constitution.⁶⁷ In *Butz*, the Secretary of Agriculture and other federal officers were sued for alleged constitutional violations by a commodities merchant.⁶⁸ The Court, as in *Bivens*, concluded that the level of protection for federal executive officers should be no greater than that afforded state executive officials in section 1983 actions, and held that only a qualified immunity would generally be afforded to federal officials whose actions are alleged to have violated a claimant's constitutional rights.⁶⁹ Further, the *Butz* Court adopted the "good faith" immunity test established in *Scheuer*.⁷⁰

64. *Id.*

65. *Id.* Although *Bivens* recognized a cause of action based on the Constitution and that the plaintiff was entitled to receive compensation if injury was proven, it did not address the issue of federal immunity. The case was remanded for a determination of this issue. *Id.* at 397-98.

66. 438 U.S. 478 (1978).

67. *Id.*

68. *Id.* *Butz* was the first Supreme Court case to determine the level of immunity to be afforded a federal executive official in a *Bivens*-type action. *Id.* at 486. The plaintiff alleged in *Butz* that the Secretary of Agriculture and other departmental officials had violated his due process rights by instituting an investigation of his commodities futures company without proper notice. *Id.* at 483.

69. *Id.* at 507. The Court, however, did recognize that absolute immunity would be available for some officials who perform "special functions," e.g. adjudicatory functions. *Id.* at 508-09. In justifying the grant of immunity to those officials whose duties are adjudicatory in nature, the Court relied on characteristics which these individuals share with the judicial process. Here, the Court reasoned, there are safeguards built in that reduce the need for private damage actions as a means for controlling unconstitutional conduct. *Id.* at 512-13. The burden of justifying absolute immunity is on the official, who must demonstrate that public policy requires an exemption. *Id.* at 506. The Court rationalized that to extend "absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees." *Id.* at 505.

The *Butz* Court distinguished the application of absolute immunity in *Barr* and *Spalding*, noting that both cases were limited to common-law tort claims. *Id.* at 495. For a discussion of *Barr* and *Spalding*, see notes 38-45 *supra*.

70. 438 U.S. at 507. For a discussion of *Scheuer*, see notes 54-59 and accompanying text *supra*. The *Butz* Court added, however, that officials will not be liable for mere mistakes in judgment, whether it is one of fact or one of law. 438 U.S. at 507.

Justice Rehnquist's dissent recognized the inconsistency of the majority's holding with prior decisions, stating that, "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.'" *Id.* at 518 (Rehnquist, J., dissenting) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 925 (1950)).

By establishing the standard to be applied to Cabinet-level officials, *Butz* set the stage for an examination of the level of immunity to be accorded the President of the United States and those in an unofficial, but nevertheless very important position—presidential aides.

In *Halperin v. Kissinger*,⁷¹ plaintiff brought suit against the President, the Attorney General, the National Security Advisor and a presidential aide, alleging both statutory⁷² and fourth amendment violations stemming from the wiretapping of his office while he was a staff member of the National Security Council.⁷³ The D.C. Circuit, relying on the objective and subjective standards set forth in *Butz*,⁷⁴ held that executive officials, including the President, were entitled only to a qualified immunity from suit.⁷⁵ President Nixon argued that he was entitled to absolute immunity.⁷⁶ The court concluded, however, that to award absolute immunity from suit would be to set the Chief Executive apart from other high executive officials.⁷⁷ The Constitution, the court determined, did not dictate such a separate privilege.⁷⁸ Although the Supreme Court reviewed the circuit court's decision in *Halperin*, it failed to decide the immunity issue.⁷⁹

It was against this background that the Supreme Court first examined the issue of immunity for the President of the United States and presidential aides in the cases of *Nixon v. Fitzgerald*⁸⁰ and *Harlow v. Fitzgerald*.⁸¹ In *Nixon*,

71. 606 F.2d 1192 (D.C. Cir. 1979), *aff'd by an equally divided vote*, 452 U.S. 713 (1981).

72. *Id.* at 1195. The Omnibus Crime Control and Safe Streets Act of 1968, tit. III, 18 U.S.C. §§ 2510-2520 (1982). Title III was designed to limit Government electronic surveillance. *Id.* at 1202. *See also* United States v. Giordano, 416 U.S. 505, 515 (1974) (the clear intent of the statute is to restrain use of electronic surveillance techniques and permit use only where circumstances warrant); Alderman v. United States, 394 U.S. 165, 175 (1968) (under Title III, eavesdropping and wiretapping are permitted only with probable cause and a warrant).

73. 606 F.2d at 1195. Plaintiff alleged that his fourth amendment rights were violated because the wiretap "search" was unreasonable and conducted without a warrant. *Id.* at 1201.

74. For a review of the subjective/objective test, see notes 57 & 62 and accompanying text *supra*. For a discussion of *Butz*, see notes 66-70 and accompanying text *supra*.

75. 606 F.2d at 1210.

76. *Id.* at 1210-13. The court noted that before accepting the President's contention that he is entitled to absolute immunity, there must be a recognition that his status sets him apart from other high executive officials and that the Constitution impliedly exempts him from all liability. *Id.* at 1210-11. The court, however, was unwilling to make such a distinction. *Id.*

77. *Id.* at 1211.

78. *Id.* The court concluded that the Constitution does not indicate any kind of immunity for the President or the Executive Branch. *Id.* Moreover, the fact that a President can be impeached demonstrates that the framers were unwilling to grant such privilege from suits. *Id.* For a discussion of the *Halperin* decision, see Comment, *Immunity of Federal Executive Officials to Damage Suits for Constitutional Violations*, 19 HOUS. L. REV. 299 (1982).

79. 452 U.S. 713 (1981).

80. 102 S. Ct. at 2690.

A. Ernest Fitzgerald, a management analyst with the Department of the Air Force, sued President Nixon for conspiring with White House aides to violate his statutory and first amendment rights by dismissing him from his position for political reasons.⁸² Finding that the principles of *Butz* were not applicable, the Supreme Court held that the President was entitled to absolute immunity from suit for his official acts.⁸³ The Court premised its holding on the belief that such immunity was not only mandated by the unique status of the President's office, but also, by the Constitution.⁸⁴ The Court also noted that a subjective analysis, warranted under the qualified immunity standard, was not practicable as applied to the President due to possible distractions that would accompany unmeritorious suits.⁸⁵ Instead, the Court relied on the impeachment mechanism, a President's desire for re-election, historical concern and scrutiny by the press and Congress, as adequate checks on presidential misconduct.⁸⁶

81. 102 S. Ct. at 2727.

82. *Nixon*, 102 S. Ct. at 2697. Fitzgerald had been dismissed from his position with the Department of the Air Force in January, 1970. *Id.* at 2693. He suspected that his dismissal was motivated by personal and political retaliation for controversial testimony he had given before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress during the final months of the Johnson Administration. *Id.* at 2693-94. The testimony had received national attention. *Id.*

Fitzgerald contended that his statutory rights under 5 U.S.C. § 7211 (Supp. III 1979) and 18 U.S.C. § 1505 (1976) were violated as a result of the dismissal. *Harlow*, 102 S. Ct. at 2732. Section 7211 provides in pertinent part that "[t]he 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." *Id.* Section 1505 provides that it is a crime to obstruct congressional testimony. *See* 17 U.S.C. § 1505 (1976).

83. *Nixon*, 102 S. Ct. at 2701. The *Nixon* Court held that, unlike other executive officials entitled to qualified immunity, the President holds a unique office rooted in the Constitution and thus must be given the greater protection of absolute immunity. *Id.*

84. *Id.* The Court concluded that because the President is granted executive power under Article II of the Constitution and is entrusted with supervisory and policy-making responsibilities entailing the utmost discretion and sensitivity, he must necessarily be immune from civil liability. *Id.* at 2702. The Court also took into account Justice Storey's analysis of executive powers in reaching its result:

"[i]here are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability."

Id. at 2701-02 (quoting J. STOREY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563, at 418-19 (1833 ed.)). The *Nixon* Court thus relied on the historical tradition of judicial deference and restraint towards the President. *Nixon*, 102 S. Ct. at 2703.

85. *Id.* at 2705. If the President were accorded a qualified immunity, he could be subjected to trial on every allegation of his impropriety. *Id.*

86. *Id.* at 2705-06. One must question, however, what realistic avenues the individual complainant has for redress under these "checks." *See* note 141 and accompanying text *supra*.

In *Harlow v. Fitzgerald*,⁸⁷ the Supreme Court determined the extent of immunity available to presidential aides. The Court analogized White House aides to Cabinet officials and state executive officers, holding that executive aides generally enjoy only a qualified immunity from suit.⁸⁸ In reaching its decision the Court relied on the policy considerations underlying its holding in *Butz* and those immunity cases brought under section 1983.⁸⁹ The Court concluded that qualified immunity for executive aides represented a balance of societal values that appropriately recognized both the rights of citizens and the need to protect officials in the exercise of their discretionary duties.⁹⁰

The *Harlow* Court rejected the seemingly-obvious analogy to the status of legislative aides, who had been awarded absolute immunity from suit in *Gravel*.⁹¹ The Court distinguished *Gravel* by noting that legislative aides derivatively receive absolute immunity from suit from the members of Congress who are protected by the speech and debate clause of the Constitution.⁹² Moreover, the *Harlow* Court added that one of the primary considerations in *Gravel*—that legislative aides are “alter egos” to the members of Congress—did not apply in the case of presidential aides.⁹³ The Court also observed that since Cabinet officials were entitled only to qualified protection, as determined in *Butz*, it would be inconsistent to afford absolute immunity to White House aides.⁹⁴

87. 102 S. Ct. at 2727. For the facts of the *Harlow* case, see notes 88-101, and accompanying text *supra*. Fitzgerald sued presidential aides Bryce Harlow (Counselor to President Nixon), and Alexander Butterfield (a White House aide). 102 S. Ct. at 2730. In addition to alleging that the defendants violated his first amendment rights, the plaintiff set forth charges under 4 U.S.C. § 7211 (Supp. III 1979), and 18 U.S.C. § 1505 (1976).

88. *Harlow*, 102 S. Ct. at 2734.

89. *Id.* at 2733. For a discussion of *Butz* see notes 66-70 and accompanying text *supra*. For a discussion of the Court's decisions concerning immunity in section 1983 suits, see notes 46-62 and accompanying text *supra*.

The *Harlow* Court observed that in *Butz* the importance of subordinates was not overlooked, but was, alone, insufficient to warrant absolute immunity. *Harlow*, 102 S. Ct. at 2733.

90. *Harlow*, 102 S. Ct. at 2733.

91. *Id.* at 2734. For a discussion of *Gravel*, see notes 27-35 and accompanying text *supra*.

92. *Harlow*, 102 S. Ct. at 2734.

93. *Id.* The Court stated that it was following a “functional” approach, extending absolute immunity only to insulate judicial, legislative and prosecutorial functions. *Id.* at 2735. Since presidential aides exercise none of these functions, the Court rejected an approach that would extend to them absolute immunity. *Id.*

94. *Id.* at 2734. Petitioners argued that the President, like a Member of Congress, must delegate a large amount of work to aides in order to perform his duties. *Id.* As a result, petitioners asserted that absolute immunity extended to the President should derivatively apply to aides. *Id.* The Court, although conceding that this argument was not without force, concluded that the contention “sweeps too far.” *Id.* The Court reasoned that, “[i]f the President's aides are derivatively immune because essential to the functioning of the Presidency, so should members of the Cabinet—Presidential subordinates some of whose essential roles are acknowledged by the Constitution itself—be absolutely immune.” *Id.* This argument for extension of immu-

The *Harlow* Court did, however, leave the door open for a presidential aide to assert absolute protection where sensitive areas of national security or foreign policy are involved.⁹⁵ Before absolute immunity would be permitted, the defendant aide would have to first demonstrate that the responsibilities of his office embrace a sensitive function and that he was discharging this function in performing the contested act.⁹⁶

Finally, the *Harlow* Court held that a subjective "good faith" requirement for qualified immunity was incompatible with the policy that insubstantial suits should not proceed past the pretrial stage.⁹⁷ Consequently, the Court displaced reliance on subjective considerations with reliance on objective reasonableness.⁹⁸ The Court declared that henceforth "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."⁹⁹

In a strong dissent, Chief Justice Burger criticized the majority's inconsistent treatment of presidential and legislative aides, arguing that the role of the President would be concomitantly diminished as a result.¹⁰⁰

nity for the Cabinet was rejected in *Butz*. *Id.* For a discussion of *Butz*, see notes 66-70 and accompanying text *supra*.

95. 102 S. Ct. at 2735. The Court, however, did not articulate what specific duties would fall under "sensitive areas," "national security," and "foreign policy." *Id.* As in *Butz*, the burden of justifying absolute immunity would be on the aide asserting it. *Id.* at 2735-36.

96. *Id.* at 2736. The Court stated that 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. . . ." *Id.* at 2736 n.20 (citing *Nixon v. Fitzgerald*, 102 S. Ct. at 2700).

97. *Id.* at 2737-38. An official's subjective good faith was viewed by the Court to be a question of fact, requiring resolution by jury, and, hence, insusceptible of resolution by summary judgment. *Id.* The majority opined that "it is now clear that substantial costs attend the litigation of the subjective good faith of government officials," which include a distraction from duties, inhibition of discretionary action, and deterrence of able people from public service. *Id.* A reliance on objective reasonableness would, through the summary judgment process, avoid excessive disruption of government and abate unsubstantial claims based on bare allegations of malice. *Id.*

98. *Id.* at 2737-38.

99. *Id.* at 2738.

100. *Id.* at 2742-43. Chief Justice Burger questioned how the majority could "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. . . ." *Id.* at 2742 (Burger, C.J., dissenting). The Chief Justice noted that in *Gravel*, the Court held legislative aides absolutely immune from suit as a derivative extension of the member's immunity under the speech or debate clause even though the clause did not specifically include legislative aides. *Id.* The dissent argued that since a "literalist" approach was abandoned in the *Gravel* decision and a "functional" analysis substituted in its place, the same analysis should apply to presidential aides. *Id.* The Chief Justice argued that the *Gravel* thesis that denial of absolute immunity to legislative aides diminishes the immunity of the member applied in an analogous fashion to the President and his aides. *Id.* at 2743 (Burger,

Thus, while the President has been granted absolute immunity from suit, executive officials on all levels, including Cabinet members and presidential aides, have received only a qualified immunity. In creating this dichotomy within the executive branch, the Court has departed from its uniform treatment of officials in the judicial and legislative branches of government.¹⁰¹

V. CRITICAL ANALYSIS

The qualified immunity standard for executive officials adopted by the Supreme Court in decisions such as *Scheuer*, *Butz* and *Harlow* embodies an appropriate and equitable policy that adequately protects the rights of citizens and, at the same time, grants officials some degree of independence and freedom from suit in the performance of their duties.¹⁰² As the Court reasoned in *Butz*,

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.¹⁰³

It is on this premise that our democratic system of jurisprudence was founded and now functions. However, notwithstanding the result reached in these decisions, it is submitted that the Court's immunity policies are deficient in several respects.

First, it is submitted that the Court's disparate treatment of official immunity in common law tort actions, as opposed to suits under section 1983 and those based directly on the Constitution, is both inconsistent and illogical.¹⁰⁴ Although the nature of an individual claimant's injury may differ from one action to another, the ability to recover damages should not depend on whether such injury is the result of a constitutional infringement or tortious conduct. Indeed, tortious conduct may often result in greater harm to the individual. However, the Court has awarded officials absolute immunity from common law actions¹⁰⁵ and generally, only a qualified immunity

C.J., dissenting). Without absolute protection for aides, the dissent contended, judicial inquiries could be made into the inner workings of the Presidential Office. *Id.*

101. *See id.* at 2743-44.

102. For a discussion of *Scheuer*, see notes 54-59 and accompanying text *supra*. For a discussion of *Butz*, see notes 66-70 and accompanying text *supra*. For a discussion of *Harlow*, see notes 81-101 and accompanying text *supra*.

103. *Butz*, 438 U.S. at 506 (quoting *United States v. Lee*, 106 U.S. 196, 220 (1882)). *See also Scheuer*, 416 U.S. at 239-40.

104. Compare *Spalding*, 161 U.S. at 483 (executive officials entitled to absolute immunity in common law tort claims) with *Harlow*, 102 S. Ct. at 2727; *Butz*, 438 U.S. at 478; *Scheuer*, 416 U.S. at 232 (presidential aides and Cabinet officials entitled to qualified immunity in actions based on the Constitution).

105. *See, e.g., Barr*, 360 U.S. at 564; *Spalding* 161 U.S. at 483. For a discussion of absolute immunity, see notes 7-10 and accompanying text *supra*.

from civil suits when they are based directly on the Constitution.¹⁰⁶

In *Scheuer*, the Court was concerned that giving absolute immunity to state officials in section 1983 suits would diminish the intended purposes of the statute.¹⁰⁷ Similarly, the *Butz* and *Harlow* Courts rationalized that to cloak federal executives in absolute immunity from constitutionally-based actions would seriously erode individual protections guaranteed by the Constitution.¹⁰⁸ These considerations, however, are subordinated in common law tort suits, where the *Spalding* and *Barr* Courts concluded that efficient public administration would be compromised due to the distractions of potentially frivolous suits.¹⁰⁹ The Court's prioritizing of one type of action over another, however, is difficult to reconcile due to the inequity that may result to the injured party bringing suit. Perhaps one explanation for the disparate treatment is that actions brought under the Constitution or section 1983 may impinge not only upon the rights of the aggrieved party but also upon the public as a whole.¹¹⁰ An alleged common law tort claim, on the other hand, arguably affects only the claimant. Thus, on balance, the distinction suggests that the interests of the official outweigh the personal interests of the one bringing suit. Nevertheless, the tortiously-injured plaintiff is still left without redress. This distinction, therefore, is an untenable one. As Justice Rehnquist has observed, the most heinous common law tort surely cannot be less important to the injured party than a technical violation of the Constitution.¹¹¹ As a result, such disparate treatment forces the claimant to simply change a legitimate claim in tort to one couched in constitutional terms.¹¹² Moreover, if independent official decision-making has been preserved by the utility of summary judgment to ferret out frivolous claims in section 1983 suits and those based directly on the Constitution,¹¹³ it is suggested that this approach would be of no less utility in tort cases. Therefore, utilization of the qualitative immunity standard, and reliance on summary judgment should be the appropriate procedure to follow in common law suits brought against all officials.

Second, it is submitted that the Court's "sensitive areas" exception to qualified immunity invites further confusion in future suits. In *Butz* and

106. See, e.g., *Harlow*, 102 S. Ct. at 2727; *Butz*, 438 U.S. at 508. For a discussion of qualified immunity, see notes 7-8, 10 and accompanying text *supra*.

107. 416 U.S. at 248. For a discussion of *Scheuer*, see notes 54-59 and accompanying text *supra*.

108. *Butz*, 438 U.S. at 505; *Harlow*, 102 S. Ct. at 2733-34.

109. *Spalding*, 161 U.S. at 498; *Barr*, 350 U.S. at 572-73. For a discussion of *Spalding*, see notes 38-41 and accompanying text *supra*. For a discussion of *Barr*, see notes 42 & 45 and accompanying text *supra*.

110. For a discussion of Section 1983 actions, see notes 46-49 and 53-62 and accompanying text *supra*. For a discussion of cases involving the immunity question in actions brought under the Constitution, see notes 63-101 and accompanying text *supra*.

111. *Butz*, 438 U.S. at 523 (Rehnquist, J., dissenting).

112. *Id.* at 522 (Rehnquist, J., dissenting). Justice Rehnquist notes that this is a task any "legal neophyte" can accomplish. *Id.*

113. *Harlow*, 102 S. Ct. at 2734.

Harlow, the Court determined that officials generally afforded a qualified immunity would be permitted to claim absolute immunity as a defense if their duties involved discretionary tasks such as "special functions," "foreign policy," or "national security" matters.¹¹⁴ However, the Court in these cases failed to adequately define these terms. Thus, any elucidation of what constitutes a "national security" matter or "special function" may result in arbitrary resolution.¹¹⁵ Many officials could justifiably argue that their contested decisions involve an area that warrants absolute protection from suit. For example, agricultural policy established by the Secretary of Agriculture could arguably be as much a "foreign policy" matter as a decision by the Secretary of State.¹¹⁶ Individuals may well differ on the question of whether either or both functions would encompass "foreign policy" or a "special function."

Third, the immunity policies established by the Court for the executive and legislative branches of government are also inconsistent.¹¹⁷ Although the President and legislators both are granted absolute immunity from suit,¹¹⁸ legislative aides are treated more favorably than both presidential aides and Cabinet members.¹¹⁹ This disparity is no more apparent than in the Supreme Court's decisions in *Gravel*¹²⁰ and *Harlow*.¹²¹

In *Gravel*, the Court premised its derivative extension of absolute immunity to legislative aides on the belief that, as "alter egos," aides are critical to the functioning of members of Congress.¹²² Without this protection, the members themselves would be open to attack.¹²³ Both the *Harlow* and *Butz* Courts, though, rejected the analogous application of this "functionalist" approach to presidential assistants.¹²⁴ As the dissent in *Harlow* observed, presidential aides are as important to the functioning of the Presidency as

114. *Id.* at 2735; *Butz*, 438 U.S. at 506. For a discussion of *Harlow*, see notes 81-101 and accompanying text *supra*. For a discussion of *Butz*, see notes 66-70 and accompanying text *supra*.

115. See note 69 and notes 95-96 and accompanying text *supra*.

116. For example, the United States government has placed several restrictions on the shipping of American farm goods to the Soviet Union due to the latter's involvement in Afghanistan.

117. Compare *Harlow*, 102 S. Ct. at 2736 and *Butz*, 438 U.S. at 507-08 (presidential aides and Cabinet officials entitled only to qualified immunity) with *Gravel*, 408 U.S. at 622 (congressional aides are absolutely immune from suit).

118. See *Nixon*, 102 S. Ct. 2690; *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *United States v. Johnson*, 383 U.S. 169 (1966).

119. Compare *Gravel*, 408 U.S. at 622 (congressional aides entitled to absolute immunity) with *Harlow*, 102 S. Ct. at 2736 and *Butz*, 438 U.S. at 507-08 (presidential assistants and Cabinet officials entitled to qualified immunity).

120. 408 U.S. at 606. For a discussion of *Gravel*, see notes 27-34 and accompanying text *supra*.

121. *Harlow*, 102 S. Ct. at 2727. For a discussion of *Harlow*, see notes 81-101 and accompanying text *supra*.

122. 408 U.S. at 617.

123. *Id.*

124. For a discussion of the status of legislative aides, see notes 27-34 and accompanying text *supra*.

legislative aides are to the functioning of Congress.¹²⁵ Indeed, the *Harlow* majority conceded as much when they removed the subjective element of the qualified immunity test due to separation-of-powers concerns.¹²⁶ Thus, to permit absolute immunity from civil suit for legislative aides, yet allow presidential assistants only a qualified protection, is unjustifiable.

The Court, in giving Cabinet level officials a lesser degree of protection from suit¹²⁷ than that granted to congressional aides, only serves to enhance this paradox. The *Gravel* Court abandoned a literal reading of the speech or debate clause by derivatively extending absolute immunity to legislative aides.¹²⁸ Instead, the Court focused on the duties performed by the aide in determining the immunity standard.¹²⁹ In contrast, the *Butz* Court took a strict construction of the Constitution in determining that Cabinet members should not be provided with absolute protection from civil suit.¹³⁰ Yet, the Court failed to recognize that a literal reading of the Constitution indicates that some Cabinet positions are expressly recognized in the Constitution while legislative assistants are not.¹³¹

Another reason the *Gravel* Court extended absolute immunity from civil suit to legislative aides was the fear that, without such immunity, the role of the individual member would be "diminished and frustrated."¹³² As noted, the Court in *Gravel* reasoned that to award any lesser immunity to the aide would expose the legislator to possible attacks through the aide from the Executive or Judiciary.¹³³ In *Butz* and *Harlow*, however, the Court failed to consider the possibility that the Executive would equally be exposed to "hostile" attack from the Congress or the Judiciary.¹³⁴

In light of the above, it is submitted that either *Butz* and *Harlow*, or

125. *Harlow*, 102 S. Ct. at 2742 (Burger, C.J., dissenting). For a discussion of the *Harlow* dissent, see note 99 and accompanying text *supra*.

126. *Harlow*, 102 S. Ct. at 2738 & n.28. The *Harlow* Court also relied on the conclusion of the Court in *United States v. Nixon*. *Id.* (quoting *United States v. Nixon*, 418 U.S. 683 (1974)). The *Nixon* Court had observed as follows:

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.

United States v. Nixon, 418 U.S. 683, 708 (1974) (footnote omitted).

127. For a discussion of *Butz*, see notes 66-70 and accompanying text *supra*.

128. 408 U.S. at 617. See notes 28-34 and accompanying text *supra*.

129. 408 U.S. at 617.

130. 438 U.S. at 507.

131. See U.S. Const. art. II, § 2, cl. 1. Article II, § 2 states in pertinent part, "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 . . ." *Id.*

132. 408 U.S. at 617. See notes 27-34 and accompanying text *supra*.

133. 408 U.S. at 617.

134. See notes 66-70 and 81-101 and accompanying text *supra*.

Gravel should be reevaluated by the Court in future immunity cases in order to reconcile these obvious inconsistencies.

Lastly, the establishment of absolute immunity from civil suit for the President of the United States,¹³⁵ legislators,¹³⁶ and judges¹³⁷ runs contrary to the expressed policy in *Butz* that “[n]o man is above the law.”¹³⁸ Accountability of each individual is lost without the availability of some avenue for an injured individual to bring suit. By totally immunizing from civil redress the leaders of the three branches of the government, the Court has reinstated the old common law belief that “the King can do no wrong.”¹³⁹ As the dissent in *Nixon* argued, “A President acting within the outer boundaries of what Presidents normally do may, without liability deliberately cause serious injury to any number of citizens even though he knows his conduct violates a statute or tramples on the constitutional rights of those who are injured.”¹⁴⁰ The same can be said of members of Congress and Justices of the Supreme Court.

Further, the formal and informal “checks” the *Nixon* Court relies on to protect the public from presidential misconduct does not provide a realistic opportunity for the individual complainant to seek redress.¹⁴¹ Congressional or electoral retaliation assumes that official indiscretions are made public. Even if they are made public, and officials are reprimanded and possibly deterred, the injured party is still without compensation.

The rationale behind the extension of absolute immunity to the leaders of the three branches of government is the belief that a lesser degree of protection from civil suit would subject the official to countless suits that would prevent the leader from performing his or her duties.¹⁴² It appears that the Court’s faith in the summary dismissal mechanism as a tool for facilitating qualified immunity determinations in the executive official context is abandoned when the party claiming immunity is a President, a legislator or a Justice of the Supreme Court.¹⁴³

VI. CONCLUSION

The above discussion illustrates how the immunity doctrine standards

135. *Nixon*, 102 S. Ct. at 2693. For a discussion of *Nixon*, see notes 80-86 and accompanying text *supra*.

136. See *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Doe v. McMillan*, 412 U.S. 306 (1973); *United States v. Brewster*, 408 U.S. 501 (1972); *United States v. Johnson*, 383 U.S. 169 (1966).

137. See *Stump v. Sparkman*, 435 U.S. 349 (1978); *Pierson v. Ray*, 386 U.S. 547 (1967); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871).

138. *Butz*, 438 U.S. at 506.

139. See note 5 and accompanying text *supra*.

140. *Nixon*, 102 S. Ct. at 2709 (White, J., dissenting).

141. For a discussion of the *Nixon* Court’s review of checks, see note 86 and accompanying text *supra*.

142. See, e.g., *Nixon*, 102 S. Ct. at 2708-09; *Gravel*, 408 U.S. at 617; *United States v. Johnson*, 383 U.S. 169, 181 (1966).

143. *Harlow*, 102 S. Ct. at 2737-38; *Butz*, 438 U.S. at 507-08.

enunciated by the Supreme Court in the last ten years lack uniformity in their treatment of different government officials. To remedy these differences, it is submitted that the Court has two options.

First, the Court could establish a broad policy that affords all officials other than the President, members of Congress and Justices of the Supreme Court, a qualified immunity defense from civil and common law suits. This task would entail a re-examination of all common law decisions where absolute immunity was awarded officials charged with common law violations, the *Gravel* decision concerning legislative aides, and those decisions derivatively extending absolute protection to quasi-judicial officials.

Alternatively, the Court could rule that all individuals, from the highest federal official to the lowest state officer are to be afforded only a qualified protection from all suits. The *Butz* and *Harlow* "reasonable" objective standard would serve as judicial guideline for qualification. The difficulty with this option is that it forces the Court to re-examine the speech or debate clause of the Constitution and adopt a more restrictive view as to legal protection for legislators than is presently applied. However, it is submitted that a general rule of qualified immunity would be the most equitable solution. A uniform immunity policy would permit judicial review of citizen complaints and protect the official's interest in governing effectively without the fear of defending frivolous suits. Without such uniformity, the right to redress of the citizen and the accountability of public officials are compromised.

Paul J. Kennedy