REMEDIES—IMMUNITY—PRESIDENT ABSOLUTELY IMMUNE FROM CIVIL DAMAGES LIABILITY FOR OFFICIAL ACTS—*Nixon v. Fitzgerald*, 102 S. Ct. 2690 (1982); PRESIDENTIAL AIDES ENTITLED TO QUALIFIED IMMUNITY FROM CIVIL DAMAGES LIABILITY FOR OFFICIAL ACTS—*Harlow v. Fitzgerald*, 102 S. Ct. 2727 (1982).

Traditionally, our government officials have enjoyed special status under the law.[1] Depending upon the functions they performed, officials were able to claim either absolute or qualified immunity from civil damages liability for discretionary acts.[2] Absolute immunity is available to government officials if the officials' actions are performed in pursuance of their duties, and thus acts as a complete bar to a lawsuit.[3] Qualified immunity, in contrast, is available to government officials only if they are able to demonstrate that they had reasonable grounds for believing that their actions were warranted and that their conduct was neither motivated by malice nor bad faith.[4]

In *Nixon v. Fitzgerald*,[5] and its companion case, *Harlow v. Fitzgerald*,[6] the Supreme Court of the United States determined the scope of civil damages immunity for actions taken by a former President and his Presidential aides. These two cases evolved from the dismissal of A. Ernest Fitzgerald from his position as an Air Force civilian management analyst.[7] Fitzgerald testified in 1968 before a congressional subcommittee that development costs of the 3.4 billion dollar C-5A transport airplane were over the proposed budget by approximately two billion dollars.[8] Shortly thereafter, Fitzgerald's job was abolished as the result of what the Air Force termed a "departmental reorganization and reduction in force."[9]

Fitzgerald's dismissal due to its retaliatory overtones generated concern in Congress and publicity in the press.[10] In 1969, President

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[1] *See generally* Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281 (providing overview of cases involving immunity defenses for government officials).

[2] *Id.* at 318.

[3] *See* Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976).

[4] *See* Wood v. Strickland, 420 U.S. 308, 321- 22 (1975). *But see* Harlow v. Fitzgerald, 102 S. Ct. 2727, 2737-38 (1982).

[5] 102 S. Ct. 2690 (1982).

[6] 102 S. Ct. 2727 (1982).

[7] *See Nixon*, 102 S. Ct. at 2693.

[8] *Id.* at 2694. Fitzgerald testified before the Subcommittee on Economy in Government of the Joint Economic Committee of Congress. *Id.*

[9] *Id.* at 2693. The reorganization and corresponding reduction in force were purportedly economical measures designed to promote departmental efficiency. *Id.*

[10] *Id.* at 2693-94. The Subcommittee on Economy in Government held public hearings concerning Fitzgerald fearing that he may have been dismissed from the Air Force due to his congressional testimony. *Id.* at 2694.

Nixon, when questioned at a news conference as to Fitzgerald's impending termination from the Air Force,[11] assured the press that he would inquire into the matter.[12] Nixon's subsequent attempts to arrange for Fitzgerald's reassignment through White House Chief of Staff H.R. Haldeman and Budget Director Robert Mayo encountered much opposition within the Administration.[13] The resistance was evidenced by an internal memorandum written by White House aide Alexander Butterfield[14] to Haldeman concerning Fitzgerald's reemployment, wherein Butterfield suggested: "We should let him [Fitzgerald] bleed, for a while at least."[15]

There apparently were no further efforts made to find alternative employment for Fitzgerald following the Butterfield memorandum.[16] Consequently, Fitzgerald filed an action with the Civil Service Commission (CSC) seeking reinstatement,[17] alleging that under the guise of a reorganization he was unlawfully terminated in retaliation for his congressional testimony.[18] After encountering nearly three years of litigation,[19] Fitzgerald was granted a public hearing before the CSC after which the CSC recommended that Fitzgerald be reappointed to his former position or comparable employment, with back pay.[20] The Commission found that the "dismissal had offended applicable civil

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[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Alexander Butterfield was Deputy Assistant to the President and Deputy Chief of Staff to H.R. Haldeman. Butterfield coordinated White House staff activities. On November 4, 1969, he was appointed Secretary to the Cabinet. In March of 1973, Butterfield left the White House to become administrator of the Federal Aviation Administration. Brief for Petitioners at 3-4, Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982) [hereinafter cited as Brief for Petitioners, Harlow v. Fitzgerald].

[15] *Nixon*, 102 S. Ct. at 2695. The memorandum stated in pertinent part: "Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the name of the game." *Id.* at 2694.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* The CSC held a closed hearing on May 4, 1971. Since Fitzgerald wished to have the Commission conduct a public hearing, he brought suit and won an injunction requiring the proceedings to be open to the press and the public. *See* Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972). Public hearings then began on January 26, 1973. *Nixon*, 102 S. Ct. at 2695.

[20] *Nixon*, 102 S. Ct. at 2696. Fitzgerald was offered a new job with the Defense Department following the CSC order. Since he considered this position to be inferior to his former position, Fitzgerald filed an enforcement action in the district court which was later settled. Under the terms of this settlement, Fitzgerald was reinstated to his former employment as Management Systems Deputy to the Assistant Secretary of the Air Force, effective June 21, 1982. *Id.* at 2696 n.17.

service regulations"[21] and that the Administration's action was prompted by "reasons purely personal to" Fitzgerald.[22] The CSC, however, noted that the record did not indicate that Fitzgerald's position had been eliminated in retaliation for his congressional testimony.[23]

Although the CSC awarded Fitzgerald reemployment and back pay, it was not empowered to provide compensatory damages (excluding back pay), interest on the judgment, or attorney's fees.[24] As a result, Fitzgerald filed suit in the United States District Court for the District of Columbia seeking 3.5 million dollars in compensatory and punitive damages for the alleged retaliatory firing,[25] arguing that the Commission's partial relief was not a substitute for such damages.[26] Fitzgerald named as defendants Defense Department officials, White House aide Alexander Butterfield, and unidentified White House aides pleaded as "John Does."[27] The court dismissed the action under the District of Columbia's three year statute of limitations after determining that the suit was commenced four years after Fitzgerald's job had been eliminated.[28] The court of appeals affirmed the dismissals as

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[21] *Id.* at 2695-96. Fitzgerald's employment placed him within the excepted service category which normally indicated that he was not protected by civil service rules and regulations applicable to removals. *Id.* at 2696 n.15. His status as a veteran, however, entitled him to special protections. One benefit afforded veterans was that: "an agency may take [adverse action] against an employee only for such cause as will promote the efficiency of the service." Veterans' Preference Act, 5 U.S.C. § 7513(a) (Supp. III 1979). Since he was a veteran, Fitzgerald was also protected by civil service reduction in force procedures. *See id.* §§ 3501-3502 (1976 & Supp. III 1979).

[22] *Nixon*, 102 S. Ct. at 2696. The CSC found that this was an improper basis for a reduction in force. Although Fitzgerald's superiors had expressed dissatisfaction with his job performance, the CSC did not decide whether " 'adverse action ' " could be taken against Fitzgerald as an " 'inadequate or unsatisfactory employee.' " *Id.* at 2696 n.16. The Commission held, however, that the Civil Service Commission's adverse action procedures, codified at 5 C.F.R. §§ 752.101-.606 (1981), prohibited the Air Force from utilizing force reduction as a justification for dismissing Fitzgerald when the actual reasons pertained to his nonoffice-related performance. *See Nixon*, 102 S. Ct. at 2696 n.16.

[23] *Nixon*, 102 S. Ct. at 2696.

[24] Brief for Respondent at 43, Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982).

[25] Fitzgerald v. Seamans, 384 F. Supp. 688 (D.D.C. 1974), *modified*, 553 F.2d 220 (D.C. Cir. 1977).

[26] *See* Fitzgerald v. Seamans, 553 F.2d 220, 226 (D.C. Cir. 1977).

[27] Fitzgerald v. Seamans, 384 F. Supp. 688, 691 (D.D.C. 1974), *modified*, 553 F.2d 220 (D.C. Cir. 1977).

[28] *See id.* at 690. The district court found that the three year statute of limitations barred the action notwithstanding Fitzgerald's allegation that a continuing conspiracy existed. *See id.* at 698. The district court rejected Fitzgerald's allegations of continuing injury noting that he had failed to allege any wrongful conduct for the three years prior to the commencement of the action. *See id.* Additionally, the court found plaintiff's allegation of a cover-up and defendant's fraudulent concealment of material facts after Fitzgerald's firing irrelevant, *see id.*, reasoning

to all defendants but Butterfield, stating that the action against him was not time-barred since it was reasonable that Fitzgerald would not have discovered White House involvement in his termination until 1973.[29] The Butterfield memorandum had been made public in that year and raised "reasonable grounds for suspicion."[30] Accordingly, the action against Butterfield was remanded for continued proceedings.[31]

After extensive discovery, it became apparent that Nixon and White House aide Bryce Harlow[32] may have been involved in Fitzgerald's dismissal.[33] Former President Richard Nixon,[34] Harlow, and other officials of the Nixon Administration were added as defendants for their participation in the alleged conspiracy to deprive Fitzgerald of his job and subsequent reemployment.[35]

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that plaintiff was aware of the essential facts alleged in his suit before the statute of limitations had run. *Id.*

[29] *See* Fitzgerald v. Seamans, 553 F.2d 220, 229 (D.C. Cir. 1977). The court reasoned that Fitzgerald had failed to bring timely action against the higher ranking defense officials although he had been aware of their conduct. Therefore, it would be unjust to permit initiation of an action against the lower ranking "John Does" because their identities and roles in the conspiracy were earlier unknown. *See id.* The action would not have been time-barred, according to the court, if Fitzgerald had sued the alleged conspirators known to him within the three year statute of limitations period and then added other defendants whose identities he learned during the course of the suit. *See id.*

[30] *Nixon*, 102 S. Ct. at 2696. On August 31, 1973 during the Watergate hearings of the Senate Select Committee on Presidential Campaign Activities, the Butterfield memorandum, dated January 20, 1970, was released to the public. Fitzgerald v. Seamans, 553 F.2d 220, 225 (D.C. Cir. 1977).

[31] *See* Fitzgerald v. Seamans, 553 F.2d 220, 231 (D.C. Cir. 1977).

[32] Bryce Harlow was a Presidential aide primarily responsible for congressional relations from January 20, 1969 until November 4, 1969. In November of 1969 he was appointed Counsellor to the President and continued to work at that position in the Nixon Administration until December 9, 1970 at which time he returned to private life. Harlow later served as Counsellor from July 1, 1973 through April 14, 1974. *Harlow*, 102 S. Ct. at 2730 & n.1. Fitzgerald claimed that Harlow remained involved in the conspiracy throughout this entire period. *Id.*

[33] Brief for Petitioners, Harlow v. Fitzgerald, *supra* note 14, at 11.

[34] *Nixon*, 102 S. Ct. at 2697. Nixon's involvement in the Fitzgerald matter evolved from a press conference in 1973 during which the former President acknowledged personal responsibility for Fitzgerald's firing by stating:

> I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans [Secretary of the Air Force] must have been talking to someone who had discussed the matter with me. No, this was not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and I stick by it.

Id. at 2695. The day after this press conference, a White House press spokesman retracted the President's statement and announced that Nixon was referring to another former executive employee whom he had mistaken for Fitzgerald. *Id.*

[35] *See id.* at 2697. Harlow's involvement in the alleged conspiracy was adduced from a series of conversations in which he discussed Fitzgerald's termination with Secretary of the Air Force Robert Seamans. *Harlow*, 102 S. Ct. at 2730 & n.2. Other evidence included a recorded

In March of 1980, Nixon and former aides Harlow and Butterfield, in separate motions for summary judgment, pleaded absolute immunity as a bar to trial and as a complete defense for their official actions.[36] The defendants argued in the alternative that they were entitled to a qualified immunity from suit because Fitzgerald had produced no evidence demonstrating that they had engaged in any wrongful behavior.[37] The district court rejected each defendant's claim of absolute immunity and ruled that genuine issues of fact precluded summary judgment on the qualified immunity issue.[38] Furthermore, the court determined that Fitzgerald's complaint stated a valid claim under the first amendment to the United States Constitution and two federal statutes.[39] The first of these statutes, 5 U.S.C. § 7211, protects the right of federal employees to supply information to Congress or its individual members,[40] while the second statute, 18 U.S.C. § 1505, provides that interference with congressional testimony is a crime.[41] The district court observed that neither statute explicitly granted an individual the right to bring a private suit for damages. Nevertheless, Fitzgerald was able to infer a cause of action under these two statutes.[42] Nixon and his former aides separately appealed the portion of the order denying absolute immunity.[43] The appellate court summarily dismissed the appeals[44] and the Supreme Court granted certiorari on June 22, 1981.[45]

In *Nixon*, the Supreme Court held that the former President was absolutely immune from civil damages liability based on his official

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conversation between Nixon and his Press Secretary Ronald Ziegler in which the former President seemed to recall that Harlow supported firing Fitzgerald. *Id.* at 2730-31 & n.3.

[36] Brief for Petitioners, Harlow v. Fitzgerald, *supra* note 14, at 12.

[37] *Id.*

[38] *Id.*

[39] *Nixon*, 102 S. Ct. at 2697. Fitzgerald had argued that his retaliatory firing violated his first amendment rights of free speech and petition. Brief for Respondent at 43, Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982).

[40] *See* 5 U.S.C. § 7211 (Supp. III 1979).

[41] *See* 18 U.S.C. § 1505 (1976).

[42] *Nixon*, 102 S. Ct. at 2697 n.20.

[43] *Harlow*, 102 S. Ct. at 2729.

[44] *Nixon*, 102 S. Ct. at 2697. The court of appeals apparently dismissed the appeals based on its decision in Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979), *aff'd by an equally divided vote*, 452 U.S. 713 (1981). *See Nixon*, 102 S. Ct. at 2697. In *Halperin*, the court ruled that high ranking government officials, including former President Nixon, could invoke only a qualified immunity defense in a civil action for damages predicated on their official acts. *See* Halperin v. Kissinger, 606 F.2d 1192, 1212-13 (D.C. Cir. 1979), *aff'd per curiam by an equally divided vote*, 452 U.S. 713 (1981); *see also infra* text accompanying notes 87-99.

[45] Nixon v. Fitzgerald, 452 U.S. 959 (1981); Harlow v. Fitzgerald, 452 U.S. 959 (1981) (cases consolidated).

acts.[46] By virtue of the distinctive functions inherent in the Presidency, the absolute immunity possessed by Nixon extended to all acts within the " 'outer perimeter' of his official responsibility."[47] While granting absolute immunity to Nixon, the Court in *Harlow* refused to do the same for his former aides, Harlow and Butterfield, holding instead that the Presidential assistants allegedly involved in the same conspiracy as Nixon enjoyed only qualified immunity.[48]

An examination of *Nixon* and *Harlow* in light of the history of immunity defenses underscores the significance of these decisions. The Supreme Court has recognized that for the government to function effectively, officials must be accorded some protection from civil liability.[49] In the landmark case of *Spalding v. Vilas*,[50] the Postmaster General was granted absolute immunity in a defamation action based upon his official conduct.[51] The Supreme Court stated that an improper motive on the part of the official was irrelevant since he had not exceeded his authority.[52] The Court reasoned that exposing officials to civil actions in which aggrieved citizens sought monetary compensation would place a considerable burden on the operation of governmental affairs.[53] In subsequent decisions the Supreme Court extended absolute immunity to other public officials including judges,[54] state prosecutors,[55] legislators,[56] and administrative hearing officers exercising quasi-judicial functions.[57]

While some officials enjoyed absolute immunity, others possessed only qualified immunity from suits for damages predicated on their official acts. *Bivens v. Six Unknown Federal Narcotics Agents*[58] estab-

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[46] *Nixon*, 102 S. Ct. at 2701.

[47] *Id.* at 2705.

[48] *Harlow*, 102 S. Ct. at 2734. The Supreme Court remanded the case for reconsideration of whether Fitzgerald's pretrial showings could withstand Harlow's and Butterfield's motions for summary judgment. *See id.* at 2739-40.

[49] *See Nixon*, 102 S. Ct. at 2699.

[50] 161 U.S. 483 (1896).

[51] *See id.* at 498.

[52] *Id.* at 498-99.

[53] *Id.* at 498.

[54] *See, e.g.*, Stump v. Sparkman, 435 U.S. 349 (1978) (state judge absolutely immune for all judicial acts including those done erroneously, in excess of authority, or maliciously).

[55] *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409 (1976) (state prosecutor absolutely immune when initiating and prosecuting criminal case).

[56] *See, e.g.*, Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) (United States Senators' and chief counsel's official activities within legislative activities absolutely protected); Tenney v. Brandhove, 341 U.S. 367 (1951) (state legislators absolutely immune when acting within scope of legislative activity).

[57] *See, e.g.*, Butz v. Economou, 438 U.S. 478 (1978) (administrative hearing officers performing functions analogous to judges and prosecutors absolutely immune).

[58] 403 U.S. 388 (1971).

lished that a victim of a constitutional violation by a federal officer was entitled to sue that official for monetary damages.[59] In *Bivens*, a civil action was instituted against federal narcotics agents for an alleged violation of the fourth amendment's prohibition against unreasonable searches and seizures.[60] Without a warrant, the federal officers had searched Bivens' apartment and arrested him for possession of narcotics.[61] The Supreme Court held that Bivens had suffered a compensable injury to a constitutionally protected interest, thus permitting him to invoke the federal question jurisdiction of the district court to obtain monetary damages against the federal officials.[62] The Court held that even absent a federal statute expressly creating the cause of action, a violation of the Constitution implied a damage remedy.[63]

Whereas the *Bivens* Court reevaluated the immunity status of federal officers, the Supreme Court, in *Scheuer v. Rhodes*,[64] examined the scope of immunity which state executive officials enjoyed when sued for constitutional violations. *Scheuer* emerged from the killing of three Kent State University students by the Ohio National Guard.[65] Representatives of the deceased students' estates brought actions under 42 U.S.C. § 1983[66] against the governor and other state officials.[67] The Court recognized that the broad discretionary responsibilities of the state officials required some form of immunity from suits for damages.[68] The Court rejected the officials' claim of absolute immu-

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[59] *See id.* at 397.

[60] *See id.* at 389.

[61] *Id.*

[62] *See id.* at 397.

[63] *See id.* at 396. The *Bivens* Court determined that the damage remedy, being one of the remedies normally available for invasion of personal interests, should be no less available when the personal rights invaded arise under the Constitution. *See id.* at 395-96. Justice Harlan maintained that the lack of congressional legislative authorization of these actions was irrelevant since the Constitution created the rights under which plaintiff sought a remedy. *See id.* at 399-406 (Harlan, J., concurring). This nonauthorization is irrelevant if there has been "no explicit congressional declaration" that individuals injured by a government official's violation of the Constitution may not rely on a specified remedy, "but must instead be remitted to another remedy, equally effective in the view of Congress." *Id.* at 397.

After holding that the complaint stated a cause of action for damages, the Court remanded the case to the Court of Appeals for the Second Circuit, which held that the federal agents, although not absolutely immune to suit, could claim the defenses of good faith and probable cause. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 456 F.2d 1339, 1347-48 (2d Cir. 1972).

[64] 416 U.S. 232 (1974).

[65] *See id.* at 234.

[66] 42 U.S.C. § 1983 (Supp. III 1979). This statute authorizes damage actions against officials who, acting under color of state law, violate constitutional rights.

[67] 416 U.S. at 234. The other state officials included senior and subordinate officers of Ohio's National Guard and the President of Kent State University, a state regulated school. *See id.*

[68] *See id.* at 247.

nity, however, concluding that the defendants were entitled to assert only a good-faith or qualified immunity defense.[69] The *Scheuer* Court provided that the liability of a state executive official was contingent upon whether the official knew or reasonably should have known that the actions in which he engaged pursuant to his responsibility and discretion violated the Constitution.[70] The majority acknowledged that high ranking officials required greater protection than those with less complex discretionary responsibilities.[71] Nevertheless, to ensure that private rights were not abused through the exercise of discretionary responsibilities, the Court assured that judicial review would be exercised faithfully over those actions of state officials which may fall outside protected areas of immunity.[72] The *Scheuer* Court justified recognition of immunity defenses as a public policy measure necessary to promote the efficient functioning of government.[73] The Court reasoned, however, that the purpose of section 1983 would be frustrated if all state government officials' acts were totally immune from liability.[74]

In *Wood v. Strickland*,[75] the Supreme Court once again considered the scope of immunity enjoyed by state officials in a section 1983 action. High school students who had been expelled from school for violating a school regulation prohibiting the use or possession of intoxicating beverages at school or school functions alleged that the school board members who had ordered their expulsion violated the students' constitutional rights.[76] In holding that the school officials could only assert a qualified, good-faith immunity defense,[77] the Court determined that an official was not shielded from civil damages liability if he knew or reasonably should have known that the actions taken pursuant to his official responsibility violated the constitutional rights of individuals.[78] Furthermore, if the official had acted with malicious intent to either deprive an individual of constitutional rights or to cause the individual injury, the official was not entitled to invoke the qualified, good-faith immunity defense.[79]

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[69] *Id.* at 247-48.

[70] *Id.* at 247; *accord* Moyer v. Peabody, 212 U.S. 78, 85 (1909).

[71] *See* 416 U.S. at 247; *see also* Barr v. Matteo, 360 U.S. 564, 573-74 (1959) (plurality opinion).

[72] *See* 416 U.S. at 248-49; *accord* Sterling v. Constantin, 287 U.S. 378, 397-98 (1932).

[73] 416 U.S. at 242; *accord* Barr v. Matteo, 360 U.S. 564, 572-73 (1959) (plurality opinion).

[74] *See* 416 U.S. at 248.

[75] 420 U.S. 308 (1975).

[76] *Id.* at 309-10.

[77] *Id.* at 322.

[78] *Id.*; *accord* Procunier v. Navarette, 434 U.S. 555 (1978).

[79] *Id.*

Although *Scheuer* and *Strickland* involved section 1983 actions against state officials, the Court's approach in these cases was extended to a suit against federal executive officials for constitutional violations in *Butz v. Economou.*[80] In *Butz,* the Court considered the scope of immunity available to various Department of Agriculture officials for allegedly instituting retaliatory proceedings against a commodities exchange merchant for his criticism of the Department's policies.[81] The Court termed unacceptable the argument that all high ranking federal officials were absolutely immune from constitutional damage actions.[82] The majority reasoned that to grant such protection to all federal executive officials who exercised discretion would vitiate a *Bivens*-type action.[83] Accordingly, the Court extended the *Scheuer* rationale of expansive qualified immunity to an executive branch official—the Secretary of Agriculture.[84] In refusing to extend the common-law absolute immunity accorded federal executive officials for their acts resulting in constitutional violations, the *Butz* Court stated that federal officials generally enjoyed only the same qualified immunity available to state officials in section 1983 cases.[85] Nevertheless, the Court observed that absolute immunity may apply in special instances if it "is essential for the conduct of the public business."[86]

The *Butz* Court distinguished executive officials performing purely administrative functions from executive officials performing quasi-judicial functions, finding that only the latter were entitled to absolute immunity.[87] In drawing this distinction, the Court reaffirmed earlier Supreme Court holdings which acknowledged that certain officials, because they performed "special functions," were absolutely immune from liability.[88] Cabinet members, because they

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[80] 438 U.S. 478 (1978). *Scheuer,* therefore, formulated the test to determine the liability of state and federal executive branch officials who allegedly violated an individual's constitutional rights. *See id.* at 506-07.

[81] *See id.* at 481-82. *Butz* involved an action brought against the Secretary and Assistant Secretary of Agriculture, an administrative judicial officer, and a chief hearing examiner. *Id.* at 478. An amended complaint named a number of officials in the Commodity Exchange Authority, an Agriculture Department attorney, and several auditors as additional defendants. *See id.* at 480.

[82] *See id.* at 485.

[83] *See id.* at 501.

[84] *See id.* at 507.

[85] *Id.* at 500; *accord* Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979), *aff'd by an equally divided vote,* 452 U.S. 713 (1981).

[86] 438 U.S. at 507; *accord* Pierson v. Ray, 386 U.S. 547, 554 (1967).

[87] 438 U.S. at 508-17.

[88] *Id.* at 508; *see, e.g.,* Imbler v. Pachtman, 424 U.S. 409 (1976); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872).

performed functions not requiring total protection, failed to qualify for absolute immunity, while administrative hearing officers, engaging in functions similar to those of judges and prosecutors, qualified for absolute immunity.[89]

While *Scheuer*, *Strickland*, and *Butz* suggested that state and federal executive officials were entitled to only qualified immunity, the scope of the immunity possessed by the President of the United States remained uncertain. For nearly two hundred years there were virtually no reported civil damages actions against a President.[90] The scope of Presidential immunity from liability in civil damages suits was finally addressed by the Court of Appeals for the District of Columbia Circuit in *Halperin v. Kissinger*.[91] In *Halperin*, ten high ranking Government officials, including former President Nixon, were sued for installing and maintaining an illegal wiretap on the Halperins' home telephone.[92] Morton Halperin, a former member of the National Security Council staff, and his family alleged that the wiretap had violated their fourth amendment rights as well as Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[93] The wiretap allegedly was an attempt by defendants to locate the source of classified Government information leaks.[94] In rejecting this justification for defendants' actions, the D.C. Circuit court held that Richard Nixon, John Mitchell, and H.R. Haldeman were not absolutely immune from liability in a *Bivens*-type action.[95] The court noted that the status of President did not place Nixon above the other high ranking

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[89] 438 U.S. at 507-17. An administrative hearing officer, according to the Court, had to be able to exercise independent judgment without fear of personal liability. *See id.* at 513. Similarly, a federal agency attorney or investigator had to be permitted to exercise discretion in initiating a hearing or prosecution without the threat of harassment through a civil suit for damages. *See id.* at 515.

[90] *See Nixon*, 102 S. Ct. at 2706 n.1 (Burger, C.J., concurring). Prior to the 1970's, there was one case in which a party sought civil damages from a President for his actions in office. *See* Livingston v. Jefferson, 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8,411) (trespass action against Thomas Jefferson dismissed because filing occurred in wrong district).

[91] 606 F.2d 1192 (D.C. Cir. 1979), *aff'd per curiam by an equally divided vote*, 452 U.S. 713 (1981).

[92] *Id.* at 1195. Other defendants included former Attorney General John Mitchell, National Security Adviser Henry Kissinger, Presidential aides H.R. Haldeman, John Ehrlichman, Alexander Haig and Jeb Magruder, FBI Director Clarence Kelley, FBI official William Sullivan, and Assistant Attorney General Robert Mardian. *Id.*

[93] *Id.* Title III limits government use of electronic surveillance techniques. It "bans most electronic surveillance and specifies procedures for wiretapping and eavesdropping in particular situations; but the statute expressly does not limit the President's constitutional power to wiretap in national security situations." *Id.* at 1202; *see* 18 U.S.C. §§ 2510-2520 (1976).

[94] *See* 606 F.2d at 1195-96.

[95] *See id.* at 1208.

executive officials named as defendants.[96] The former President and his codefendants were permitted to claim only a qualified immunity—the court reasoning that this limited immunity sufficiently protected a President since a plaintiff would have difficulty stating a cause of action which would defeat this limited defense.[97] The majority, adopting the *Strickland* rationale, determined that the President would lose his qualified immunity "only if plaintiffs could show that he acted with 'actual malice' or that he failed to meet a statutory or constitutional obligation that was clear under the circumstances as understood at the time."[98]

The court of appeals asserted that there existed no constitutional justification for granting the former President absolute immunity.[99] Moreover, separation of powers did not mandate that Nixon be immune from judicial process.[100] According to the *Halperin* court, a decision holding a President liable for a violation of a constitutional right would not significantly impair his ability to govern effectively.[101] The court also noted that litigation would not place a special burden on the President's personal finances since the Government would represent him in suits based on his official actions.[102] Finally, the court reasoned that our "tradition of equal justice under law" required that Nixon be accorded only qualified immunity.[103] It was against this historical background that *Nixon* and *Harlow* were decided.

Before addressing the immunity issue, the *Nixon* Court considered two jurisdictional challenges raised by Fitzgerald. The former President attempted to invoke the jurisdiction of the Supreme Court under 28 U.S.C. § 1254 which grants the Court authority to review cases in the courts of appeals.[104] The appellate court dismissed Nixon's appeal of the "interlocutory order denying his claim to absolute immunity" for lack of jurisdiction.[105] Based on that dismissal, Fitzgerald argued that the district court's order was not an appealable case

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[96] *See id.* at 1210-11.

[97] *Id.* at 1213.

[98] *Id.* at 1212-13 (footnotes omitted).

[99] *Id.* at 1211; *see* United States v. Nixon, 418 U.S. 683 (1974); United States v. Burr, 25 F. Cas. 191 (C.C.D. Va. 1807) (No. 14692g).

[100] 606 F.2d at 1211.

[101] *See id.* at 1212.

[102] *Id.* at 1213.

[103] *Id.*

[104] *Nixon*, 102 S. Ct. at 2697. See 28 U.S.C. § 1254 (1976) which provides in pertinent part: "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

[105] *Nixon*, 102 S. Ct. at 2697-98.

properly in the court of appeals pursuant to section 1254 and accordingly, the Supreme Court could not exercise its discretionary jurisdiction.[106]

The *Nixon* Court decided that the district court's order met the criteria of a "collateral order" as set forth in *Cohen v. Beneficial Industrial Loan Corp.*,[107] thus making it immediately appealable to the court of appeals.[108] According to the collateral order doctrine of *Cohen*, a limited class of interlocutory orders can be appealed immediately to the court of appeals, provided that the orders "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment."[109] Noting that the present controversy concerned "a threatened breach of essential Presidential prerogatives under the separation of powers"[110] the Court decided that a " 'serious and unsettled' " question had been presented to the court of appeals and thus was immediately reviewable.[111]

In rejecting Fitzgerald's second jurisdictional challenge, the Court stated that an agreement between the parties as to the amount of damages involved had not mooted the controversy.[112] The Court determined that both parties still had a recognizable financial interest in the outcome of the lawsuit thereby preserving the viability of the controversy.[113]

The Court next addressed the scope of immunity to which government officials are entitled. Justice Powell, writing for the *Nixon*

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[106] *See id.* at 2698.

[107] 337 U.S. 541 (1949).

[108] *See Nixon*, 102 S. Ct. at 2698.

[109] *Id.* (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)).

[110] *Id.* (citing United States v. Nixon, 418 U.S. 683, 691-92 (1974)).

[111] *Id.*; *see* Helstoski v. Meanor, 442 U.S. 500 (1979); Abney v. United States, 431 U.S. 651 (1977).

[112] *See Nixon*, 102 S. Ct. at 2698-99. After Nixon had filed his petition for certiorari, he and Fitzgerald reached an agreement to liquidate damages. *Id.* Nixon agreed to pay Fitzgerald $142,000 in exchange for Fitzgerald's promise to accept liquidated damages of $28,000 if the Supreme Court ruled that Nixon was not entitled to absolute immunity. *Id.* at 2699. If the former President were found to be absolutely immune, Fitzgerald would not be entitled to receive the agreed upon sum of $28,000. *Id.* In his dissenting opinion, Justice Blackmun opined that the *Nixon* case was in effect settled by Nixon's payment of $142,000 to Fitzgerald. *Id.* at 2727 (Blackmun, J., dissenting). Since the parties had settled the issue of damages by agreeing not to bring any further proceedings, the case appeared to present nothing more than the settlement of a "wager" which would result in the Court issuing a judgment somewhat akin to an advisory opinion. *Id.* Justice Blackmun concluded that the Supreme Court should not have exercised its power of discretionary review over the case. *See id.*

[113] *Id.* at 2699. *See generally* Havens Realty Corp. v. Coleman, 102 S. Ct. 1114, 1120 (1982); Powell v. McCormack, 395 U.S. 486, 495-500 (1969); Bond v. Floyd, 385 U.S. 116, 128 n.4 (1966).

majority, concluded that the former President should be accorded "absolute . . . immunity from damages liability for acts within the 'outer perimeter' of his official responsibility."[114] The majority, relying on our nation's history and the tradition of the separation of powers, reasoned that this protection was "functionally mandated" by the uniqueness of the Presidency.[115]

In rejecting Fitzgerald's contention that former President Nixon was entitled only to qualified immunity, the Court found *Scheuer* and *Butz* inapposite since these cases only addressed the scope of immunity accorded executive officials other than the President.[116] The *Nixon* Court explained that the President was entitled to unique treatment because he was the only executive official who derived his authority from the Constitution.[117] The Court observed that the "singular importance" of the President in the "effective functioning of government" mandated that he be accorded absolute immunity.[118] Justice Powell further noted that absolute Presidential immunity was necessary since the visibility of his office rendered the President particularly vulnerable to civil actions for damages.[119] Defending private suits would divert the President's attention from official duties thereby jeopardizing the Presidency and the effective functioning of the entire nation as well.[120]

Justice Powell also suggested that absolute Presidential immunity was justified because this protection was rooted in the need to preserve a balance between the three coordinate branches of the Federal Government.[121] The majority noted that traditionally courts exercised judicial deference and restraint concerning Presidential actions in accordance with the separation of powers doctrine which mandated

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[114] *Nixon*, 102 S. Ct. at 2705.

[115] *Id.* at 2701-02 (citing J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563, at 418-19 (1833)). *Contra Halperin*, 606 F.2d at 1210-11.

[116] *See Nixon*, 102 S. Ct. at 2702.

[117] *See id.*

[118] *Id.* at 2703. *But cf.* Complete Auto Transit v. Reis, 451 U.S. 401, 429 (1981) (Burger, C.J., dissenting) (fundamental to organized society that each individual be individually accountable for acts).

[119] *See Nixon*, 102 S. Ct. at 2703. The Court reasoned that the President would be particularly susceptible to private suits for monetary compensation since it was inevitable that his official actions and decisions would affect the lives of millions of people. *See id.*; *cf.* Pierson v. Ray, 386 U.S. 547, 554 (1967) (judges granted absolute immunity for actions within judicial jurisdiction since judges intimately affect lives of entire public and to perform properly must not be fearful of consequences of actions).

[120] *Nixon*, 102 S. Ct. at 2703.

[121] *See id.* at 2703-04. *See generally* Mississippi v. Johnson, 71 U.S. (4 Wall) 475 (1866); Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838).

that the judicial branch of the Federal Government refrain from undue interference with activities of the executive branch.[122] The Court continued that this principle, however, does not place Presidential actions outside the Court's jurisdictional review in every instance.[123] Rather, the Court maintained that jurisdiction is contingent upon balancing the constitutional significance of the complainant's interest against the possible harm resulting from interference with executive branch functions.[124] The Court concluded that the situation presented in *Nixon* did not warrant the exercise of jurisdiction because judicial action was unnecessary "to serve broad public interests."[125]

In granting the President absolute immunity, the *Nixon* Court adopted a methodology heretofore never utilized in determining the scope of immunity available to government officials. The Court rejected the traditional functional methodology which determined the scope of immunity based on consideration of acts performed as functions of the office,[126] and instead adopted a methodology concentrating on the office itself to determine the scope of immunity.[127] Noting that the President performed discretionary functions in various areas, the Court reasoned that in many situations it would be difficult to ascertain which of the President's numerous functions covered the conduct in question.[128] Concluding that the functional approach advocated by Fitzgerald and the dissent would require "highly intrusive" inquiries into the President's motives, the *Nixon* Court held this approach improper when evaluating Presidential immunity.[129]

Fitzgerald also contended that by ordering his dismissal, Nixon had acted beyond the perimeters of his duties, thus circumventing the former President's immunity claim.[130] Refuting this contention, the

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[122] *Nixon*, 102 S. Ct. at 2703-04.

[123] *Id.* at 2704; *see, e.g.*, United States v. Nixon, 418 U.S. 683 (1974); *cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (jurisdiction exercised over Secretary of Commerce in enjoining execution of direct Presidential order).

[124] *Nixon*, 102 S. Ct. at 2704; *see* Nixon v. General Servs. Admin., 433 U.S. 425, 443 (1977); United States v. Nixon, 418 U.S. 683, 705-13 (1974).

[125] *Nixon*, 102 S. Ct. at 2704.

[126] *See id.* at 2705. For use of the functional methodology, see, e.g., *Butz*, 438 U.S. at 508-17; Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976).

[127] *See Nixon*, 102 S. Ct. at 2705; *cf.* Stump v. Sparkman, 435 U.S. 349, 363 & n.12 (1978) (judiciary granted absolute immunity for acts performed outside "the normal attributes of a judicial proceeding").

[128] *Nixon*, 102 S. Ct. at 2705.

[129] *Id.*

[130] *Id.* Fitzgerald argued that his discharge by the President was unlawful since the dismissal was not ordered in furtherance of the best interests of the service, as required by 5 U.S.C. § 7513 (a) (Supp. III 1979). That section provides in pertinent part that "an agency may take an action against an employee only for such cause as will promote the efficiency of the service."

majority stated that 10 U.S.C. § 8012(b) granted the President the authority to designate the manner in which the Secretary of the Air Force managed that agency's business.[131] Consequently, the Court decided that Nixon had acted within the outer perimeter of his authority by ordering the reorganization of the Department.[132]

Finally, the majority reasoned that its decision did not leave citizens without protection from Presidential abuses.[133] Formal and informal checks on Presidential actions such as scrutiny by the press, oversight by Congress, the threat of impeachment, and the desire to be reelected, observed the Court, adequately safeguarded the nation and assured the Court that its decision did not place the President " 'above the law.' "[134]

In a concurring opinion, Chief Justice Burger emphasized that absolute Presidential immunity had its genesis in the separation of powers doctrine.[135] The Chief Justice pointed out that instead of granting "sweeping immunity" to a President for all acts, the *Nixon* Court had merely granted a President absolute immunity from civil damage suits.[136] Furthermore, he maintained that a President would not be protected from liability for acts outside his official duties.[137]

Continuing his analysis, the Chief Justice distinguished *United States v. Nixon*,[138] upon which the dissent relied to support its position. The dissenting opinion quoted language from that decision which indicated that the separation of powers doctrine did not support absolute Presidential immunity from judicial process in all situations.[139] Chief Justice Burger, however, concluded that the rationale employed by the Court in *United States v. Nixon* was inapplicable to *Nixon v. Fitzgerald*, reasoning that, whereas the former case involved a criminal prosecution, the latter case concerned a civil action for money damages.[140] According to the Chief Justice, this rendered the

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[131] *Nixon*, 102 S. Ct. at 2705. The statute, 10 U.S.C. § 8012(b) (1976), provides in pertinent part that the Secretary of the Air Force "shall perform such other duties relating to Air Force affairs, and conduct the business of the Department in such manner, as the President or the Secretary of Defense may prescribe."

[132] *Nixon*, 102 S. Ct. at 2705.

[133] *See id.* at 2705-06.

[134] *Id.* at 2706. *See generally* Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681 (1979).

[135] *Nixon*, 102 S. Ct. at 2706 (Burger, C.J., concurring).

[136] *Id.*

[137] *Id.*

[138] 418 U.S. 683 (1974).

[139] *See Nixon*, 102 S. Ct. at 2718 (White, J., dissenting) (quoting United States v. Nixon, 418 U.S. at 706).

[140] *Id.* at 2707 (Burger, C.J., concurring).

language quoted from *United States v. Nixon* inapposite to the civil liability immunity issue.[141]

Chief Justice Burger also discussed the impropriety of judicial probing into Presidential decision-making, asserting that private damage actions would lead to judicial questioning of Presidential conduct resulting in inappropriate interference with the functioning of the Presidency.[142] Consequently, the need to prevent judicial intrusion upon the Presidency "far outweigh[ed]" the need to provide private individuals the right to vindicate their claims.[143] The Chief Justice additionally reiterated the majority's contention that forcing the President to defend private damage suits would divert the President's attention from his duties, thus significantly impeding his effectiveness.[144] In conclusion, Chief Justice Burger observed that rather than placing the President "above the law," the Court's holding merely placed him on equal footing with other public officials who enjoyed absolute immunity.[145]

Unpersuaded by the public policy and constitutional arguments advanced by both the majority and concurring opinions, the dissent chided the Court for its refusal to follow the functional approach in analyzing the immunity issue. In his dissent, Justice White contended that absolute immunity should not attach to all Presidential functions but should be extended only to those specific Presidential functions requiring total protection.[146] The dissent did not consider the dismissal of a federal employee to be within the range of Presidential functions provided by the Constitution.[147] Accordingly, the function implicated in *Nixon* did not merit complete protection because the President was not involved in privileged conduct.[148]

Justice White further objected to the Court's holding noting that it placed the President above the law and was a "reversion to the old

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[141] *Id.*

[142] *See id.* at 2708-09 (Burger, C.J., concurring).

[143] *Id.* at 2708 (Burger, C.J., concurring).

[144] *Id.* at 2709 (Burger, C.J., concurring).

[145] *Id.*; *see supra* notes 50-57 and accompanying text.

[146] *See Nixon*, 102 S. Ct. at 2723 (White, J., dissenting).

[147] *Id.* at 2720 (White, J., dissenting). The functional approach to immunity treated Presidential conduct as absolutely protected if the conduct could be defined as a "constitutionally assigned executive function, the performance of which would be substantially impaired by the possibility of a private action for damages." *Id.* Justice White did not find the decision to terminate Fitzgerald's employment to be a "constitutionally assigned presidential function that will tolerate no interference by either of the other two branches of the government." *Id.* at 2723 (White, J., dissenting).

[148] *See id.*

notion that the King can do no wrong."[149] The dissent observed that this holding permitted a President acting within the outer boundaries of his normal duties deliberately to violate the Constitution and federal statutes and to escape liability for injury inflicted as a result of conduct which he knew was clearly illegal.[150]

Justice White also discredited Nixon's argument that absolute Presidential immunity was recognized as implicit in the Constitution during the Constitutional Convention debates and that impeachment was intended to be the exclusive remedy for Presidential misconduct.[151] The dissent commented that the Convention debates focused on wrongs committed by the Chief Executive against the State, rather than on wrongs against individuals.[152] Therefore, Justice White stated that the framers of the Constitution did not intend that the impeachment remedy foreclose all other methods of holding the President legally accountable.[153]

Although the *Nixon* majority failed to apply the functional approach to immunity, the *Harlow* Court wholeheartedly supported its application. Utilizing the functional approach, the *Harlow* majority rejected the petitioners' claim that they were entitled to absolute immunity based on the special functions which they performed as White House aides.[154] Instead, the Court held that chief Presidential aides generally enjoyed only a limited, qualified protection from civil suits arising out of official acts.[155] This special functions rationale, however, did not warrant total exemption from civil liability for all Presidential assistants in the performance of their duties.[156] To show absolute immunity entitlement, a Presidential assistant had to demonstrate that his official responsibilities encompassed sensitive functions

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[149] *Id.* at 2711 (White, J., dissenting). In a separate dissenting opinion, Justice Blackmun agreed that no man, not even the President, was "absolutely and fully above the law." *Id.* at 2726 (Blackmun, J., dissenting).

[150] *See id.* at 2709-10 (White, J., dissenting).

[151] *See id.* at 2713-17 (White, J., dissenting). Justice White did not agree with Nixon's contention that absolute immunity was an " 'incidental power' of the Presidency, historically recognized as implicit in the Constitution." *Id.* at 2713 (White, J., dissenting). The dissent explained that since diverse opinions concerning Presidential immunity were expressed at the first Senate meeting, historical evidence demonstrated that Presidential immunity was as controversial in colonial times as it is now. *See id.* at 2713-17 (White, J., dissenting).

[152] *Id.* at 2713-14 (White, J., dissenting).

[153] *Id.* at 2714-15 (White, J., dissenting).

[154] *Harlow*, 102 S. Ct. at 2735-36.

[155] *Id.* at 2732-33. The Court noted, however, that the Chief Executive's aides who exercised their discretionary power in the sensitive areas of national security and foreign policy might be entitled to absolute immunity. *Id.* at 2735; *cf.* United States v. Nixon, 418 U.S. at 710-11 (decisions implicating foreign policy and military affairs are afforded more deference).

[156] *Harlow*, 102 S. Ct. at 2735.

requiring a complete shield from liability and that he was performing such a protected function when he engaged in the act in question.[157] The *Harlow* Court decided that neither aide had made this requisite showing.[158]

Additionally, the Court refused to grant absolute derivative immunity to Presidential aides, maintaining that this concept was irreconcilable with the functional approach to immunity.[159] The *Harlow* Court's rationale, therefore, differed from that utilized in *Gravel v. United States*,[160] in which the Supreme Court held that a Senator's aide enjoyed the same absolute immunity from civil liability for legislative acts as that possessed by a Senator himself.[161] The *Harlow* Court stated that this immunity attached only when aides performed " 'acts legislative in nature' and not when taking other acts even 'in their official capacity.' "[162] Accordingly, the *Harlow* Court concluded that *Gravel*, which supported derivative legislative immunity, did not require that Presidential aides be granted immunity comparable to that of the President.[163] The Court justified its decision by noting that in *Butz* it had held that cabinet members, who are direct subordinates of the President and often have greater responsibilities than White House aides, possess merely a qualified immunity.[164] Therefore, the *Harlow* Court maintained that it was unsound to accord the White House staff greater protection from civil damages suits than that granted to higher ranking cabinet officials.[165] Furthermore, the Court, citing *Scheuer* and *Butz*, stated that qualified immunity was the norm for executive officials.[166]

The *Harlow* Court modified the traditional qualified immunity standard which provided that this defense was not available to an official if he "knew or reasonably should have known" that his actions violated one's constitutional rights or if he acted "with the malicious intention" to deprive one of his legal rights.[167] The Court discussed the

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[157] *Id.* at 2736.

[158] *See id.*

[159] *Id.* at 2735.

[160] 408 U.S. 606 (1972).

[161] *Id.* at 621-22. The *Gravel* Court reasoned that legislative aides were a Senator's "alter egos" and therefore shared the Senator's constitutional privilege of absolute immunity for legislative acts. *See id.* at 616-17.

[162] *Harlow*, 102 S. Ct. at 2735 (quoting *Gravel*, 408 U.S. at 625); *see also* Hutchinson v. Proxmire, 443 U.S. 111, 125-33 (1979).

[163] *Harlow*, 102 S. Ct. at 2734-35.

[164] *Id.* at 2734.

[165] *See id.*

[166] *Id.* at 2733.

[167] *Strickland*, 420 U.S. at 320-22; *see supra* notes 75-79 and accompanying text.

objective and subjective elements present in this good-faith defense, finding that the objective component required that an official recognize and respect an individual's well established constitutional rights,[168] while the subjective component required that an official exercise " 'permissible intentions.' "[169] The Court eliminated the subjective element of qualified immunity whereby the good-faith defense was unavailable to an official who maliciously caused injury to another.[170] In so doing, it maintained that a plaintiff's mere allegations of malice would no longer be sufficient to expose government officials to the burdens of either trial or discovery.[171] The majority stated that government officials should be liable for civil damages only if they "violat[ed] clearly established statutory or constitutional rights of which a reasonable person would have known."[172] While recognizing the public interest in deterring unlawful conduct and compensating victims of official misconduct, the *Harlow* Court observed that its holding protected the decision-making processes of officials, thus promoting the effective operation of government.[173] By limiting the qualified immunity defense to an objective standard, the majority asserted that it had struck an appropriate balance between competing interests of society.[174]

Chief Justice Burger, in his dissenting opinion, was unable to reconcile *Gravel* and *Harlow*. He agreed with the *Gravel* Court's reasoning that the purpose of providing a Senator with absolute immunity would be diminished and frustrated if his aides were not extended equivalent protection.[175] Similarly, he asserted that the func-

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[168] *See Harlow*, 102 S. Ct. at 2737.

[169] *Id.* (quoting *Strickland*, 420 U.S. at 320).

[170] *See id.* at 2738.

[171] *Id.* The Court recognized a valid interest in the quick disposal of a case involving an official, reasoning that extensive and prolonged inquiries into an official's subjective motivation could disrupt the efficient functioning of government. *Id.*

[172] *Id.* (citing Procunier v. Navarette, 434 U.S. 555, 565 (1978), *Strickland*, 420 U.S. at 321). The *Harlow* Court offered no opinion "concerning the elements of the immunity available to state officials" but noted that it was untenable to differentiate between suits brought against state officials under § 1983 and suits brought against federal officials under the Constitution. *Id.* at 2738 n.30.

[173] *See id.* at 2739.

[174] *See id.*

In a concurring opinion, Justice Brennan agreed with the majority's standard holding an official liable if he "knew or should have known" that his conduct was violative of constitutional rights. *Id.* at 2740 (Brennan, J., concurring). He added, however, that occasionally it would be necessary to engage in limited discovery in order to ascertain what was known by the defendant when he acted. *See id.* at 2740; *cf.* Herbert v. Lando, 441 U.S. 153, 170 (1979) ("impenetrable barriers" to plaintiff's cause of action cannot be erected).

[175] *Harlow*, 102 S. Ct. at 2742-43 (Burger, C.J., dissenting).

tioning of the Presidency would be adversely affected if Presidential assistants were not accorded absolute derivative immunity.[176] The Chief Justice emphasized that Presidential aides implemented their superior's policies and, in effect, were the President's alter egos, thus making them essential to the functioning of the Presidency.[177] Therefore, the dissent maintained that both Harlow and Butterfield should enjoy absolute immunity since the same public policy considerations which supported absolute immunity in *Nixon* and *Gravel* were applicable to chief White House aides.[178]

Finally, the Chief Justice found *Butz* to be clearly distinguishable from *Harlow*, contending that the *Butz* Court's determination of qualified immunity for cabinet members did not dictate similar protection for Presidential aides.[179] Chief Justice Burger noted that senior White House assistants work on a daily basis with the President and have a closer relationship with him than cabinet officers.[180] Accordingly, it was not inconsistent to hold that Presidential aides should be accorded greater immunity than cabinet officials.[181]

Nixon and *Harlow* are predicated on the notion that government operates efficiently only if certain officials are free to perform their functions unhampered by the threat of civil damages suits.[182] Courts employ a balancing of interests approach to determine the scope of immunity available to officials whose actions are challenged.[183] Competing considerations include: compensating victims whose legal rights are violated; deterring illegal conduct by government officers;[184] encouraging public servants to execute their duties vigorously and fearlessly;[185] and minimizing judicial interference with governmental action.[186]

The *Nixon* Court determined that compensation and deterrence were outweighed by the resulting impairment of Presidential effectiveness which judicial scrutiny of Presidential action would effect. Underlying *Nixon* is the premise that the rights of an individual can be

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[176] *Id.* at 2743-44 (Burger, C.J., dissenting).

[177] *Id.* at 2742-43 (Burger, C.J., dissenting).

[178] *Id.* at 2743 (Burger, C.J., dissenting).

[179] *See id.* at 2744 (Burger, C.J., dissenting).

[180] *Id.*

[181] *Id.*

[182] *See generally* Schuck, *supra* note 1, at 281 (discussing public policy considerations supporting immunity for government officials).

[183] *Id.* at 282.

[184] *Id.*

[185] *Id.*; *see also* Ferrie v. Ackerman, 444 U.S. 193, 203 (1979).

[186] *See Nixon*, 102 S.Ct. at 2705; *id.* at 2707-09 (Burger, C.J., concurring).

sacrificed for the greater public good. The Court considered absolute immunity as an incident of office necessary to promote the effective functioning of the Presidency.[187] Furthermore, the majority determined that the separation of powers doctrine mandated that absolute immunity from civil liability be accorded the President for actions falling within the outer perimeter of his duties.[188]

The *Nixon* Court thus granted absolute immunity to the former President, limited by an apparent restriction. The outer perimeter test proposed as a check on the Chief Executive's conduct fails to provide adequate guidelines for determining the Presidential actions which meet this threshold requirement for absolute immunity. In stating that it would not intrude upon the President's decision-making process by inquiring into his motives,[189] the Court made it impossible to determine the acts which are properly within the scope of the President's duties, thereby effectively granting a President absolute immunity for virtually all his acts. This broad and inflexible result circumvents the constitutional safeguard that all officials, including the President, observe limitations on their authority.[190] Since the Constitution operates as a check on the powers of the three coequal branches of the Federal Government, it is specious to hold, as the majority did in *Nixon*, that subjecting a President to constitutional restrictions offends the doctrine of the separation of powers.[191]

The possible ramifications of *Nixon* are disturbing. The Court's holding amounts to a recognition that the Chief Executive, because of his office, may violate the law with impunity, thus belying the principle that all officials, "from the highest to the lowest, are creatures of the law, and are bound to obey it."[192] Determining the scope of immunity by office rather than by function allows a President to act in whatever manner he chooses without fear of liability. Therefore, even if Nixon had known that the reorganization leading to Fitzgerald's dismissal was contrary to the law, the former President would be totally insulated from a civil suit. For purposes of the absolute immunity defense, it is irrelevant that Nixon's actions were taken for the unlawful purpose of penalizing the exercise of statutorily and constitutionally protected rights.[193]

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[187] *Nixon*, 102 S. Ct. at 2701, 2703.

[188] *Id.* at 2701, 2704-05.

[189] *See id.* at 2705.

[190] *See* United States v. Nixon, 418 U.S. 683 (1974); *see also* Kilbourn v. Thompson, 103 U.S. 168, 191 (1880).

[191] See *Nixon*, 102 S. Ct. at 2724-25 (White, J., dissenting).

[192] United States v. Lee, 106 U.S. 196, 220 (1882).

[193] *See Nixon*, 102 S. Ct. at 2709-10 (White, J., dissenting).

The *Nixon* Court failed to recognize that the functional theory of immunity affords adequate protection to a President. Under the functional theory, a court's central inquiry is whether the challenged act is within the broad range of constitutionally derived Presidential functions and is of such a sensitive nature so as to require that the President be absolutely immune for these acts.[194] Consequently, the President would be absolutely immune for discretionary conduct within this functional zone while other acts beyond the President's functions would not warrant the identical level of protection.

The *Harlow* Court's refusal to extend absolute immunity to Presidential aides for all official actions should be equally applicable to the President. The qualified immunity defense offers intermediate protection by insulating an official from damages liability unless he violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[195] This defense provides the President with sufficient protection since an immunity determination would consider the broad responsibilities and unique discretion inherent in the Presidency.[196] Additionally, absolute immunity should not be granted to the President for performing actions which a reasonable person would have known are wrongful. Qualified immunity would adequately protect the President by excusing him from liability for bona fide errors in judgment and by requiring him only to refrain from violating clearly established rights which a reasonable person would have known.

Public policy does not mandate a blanket recognition of absolute immunity for either the President or his aides.[197] Instead, policies underlying the immunity doctrine can be effectively served through the protection afforded by qualified immunity which seeks to vindicate innocent officials yet compensate victims of official transgressions and deter future wrongful conduct.

Notwithstanding the Court's policy judgments, the most apparent ambiguity in *Nixon* concerns the scope of protection actually

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[194] *See id.* at 2723; *Harlow*, 102 S. Ct. at 2736; *see also Butz*, 438 U.S. at 506.

[195] *Harlow*, 102 S. Ct. at 2738.

It is important to note that since the *Harlow* Court essentially eliminated the subjective malice element of qualified immunity, government officials are no longer required to act in good faith or to avoid malicious action. While technically a defeat for the Presidential aides, *Harlow* is nonetheless a victory for government officials since they can no longer be sued for malicious actions unless they knew or reasonably should have known that their actions were wrongful.

[196] *See Halperin*, 606 F.2d at 1212-13.

[197] If Congress interprets public policy as requiring absolute Presidential immunity from civil liability, it can enact legislation immunizing the President. *See Nixon*, 102 S. Ct. at 2725 (White, J., dissenting).

conferred upon the President. The *Nixon* Court determined that although "Congress [has not] taken express legislative action to subject the President to civil liability for his official acts,"[198] the Court assumed *arguendo* that it could infer a cause of action premised on the first amendment and the two federal statutes upon which Fitzgerald relied.[199] The Court then stated that its holding was limited to absolute Presidential immunity from civil damages liability for official acts in the "absence of explicit affirmative action by Congress."[200] The *Nixon* Court, therefore, did not examine the scope of immunity to which the President would be entitled if Congress had explicitly provided a private cause of action.[201]

The apparent restriction on the scope of the decision is inconsistent with the *Nixon* Court's justification for granting absolute Presidential immunity. Justice Powell maintained that the separation of powers doctrine supported absolute immunity from civil liability for the President.[202] This constitutional premise upon which absolute immunity is based, however, would also preclude Congress from providing a remedy against the President for misconduct. Thus by logically extending the *Nixon* Court's analysis, even if Congress had taken express action, the resulting legislation would be unconstitutional under the separation of powers doctrine. The *Nixon* grant of absolute immunity is, therefore, far more expansive than acknowledged by the majority.[203]

The *Nixon* Court failed to recognize that the separation of powers doctrine mandates that the President be legally accountable for interference with congressional action. Although observing that Fitzgerald's causes of action would impair the effective functioning of the Presidency,[204] the Court neglected to discuss the negative impact of its decision on Congress, thus seemingly placing a higher premium on Presidential functions.[205] Congress' purpose in enacting 5 U.S.C. § 7211 and 18 U.S.C. § 1505 was to enable government employees like Fitzgerald to freely testify before congressional committees without fear of retaliation.[206] The statutes were intended to curb Presidential

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[198] *Id.* at 2701.

[199] *Id.* at 2701 n.27.

[200] *Id.*

[201] *Id.*

[202] *Id.* at 2701.

[203] *See id.* at 2723-24 (White, J., dissenting). Justice White maintained that the Court's opinion established that congressional legislation could not alter absolute Presidential immunity which was grounded in the Constitution. *See id.*

[204] *Id.* at 2703.

[205] *See id.* at 2721 (White, J., dissenting).

[206] *Id.* at 2720 (White, J., dissenting).

abuses of power and to assure congressional access to information possessed by the executive branch of the Federal Government.[207] If Congress is hindered in obtaining relevant information concerning the activities of the executive branch, it cannot effectively perform its "oversight" function.[208]

Nixon and *Harlow* will have a broad impact on official immunity. Absolute immunity as granted in *Nixon* operates as a total bar to suit thus precluding even meritorious claims and leaving aggrieved victims of Presidential misconduct remediless. Exonerating the President from personal liability for official acts in every circumstance contradicts the very purpose of *Bivens*—implying a damage remedy for a constitutionally based violation. Meaningful enforcement of the rights guaranteed by law entitles an aggrieved party to seek recompense from the President for statutory and constitutional violations. Policy justifications favoring absolute immunity are not enough to shield all Presidential actions from liability. Instead, the qualified immunity "knew or should have known" test, enunciated in *Harlow*, affords ample protection to all officials, including the President. This standard of liability recognizes that recovery of damages is the most effective means to remedy Presidential misconduct and prevent its recurrence.

Mary-Lynne Ricigliano

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[207] *Id.*

[208] *See id.* at 2721 (White, J.,dissenting).