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Absolute Presidential Immunity From Civil Damage Liability: Nixon v. Fitzgerald

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CASENOTES

Absolute Presidential Immunity From Civil Damage Liability: *Nixon v. Fitzgerald*[1] — The Constitution of the United States contains no express provision dealing with the immunity[2] of the President of the United States from civil damage liability.[3] Prior to 1982, the United States Supreme Court apparently had considered the general issue of presidential immunity on only two occasions,[4] and had never dealt with the specific question of presidential immunity from civil damage liability. Moreover, in the nearly two hundred years preceding 1971, only one lawsuit was brought in which a party sought civil damages from a United States president for his actions in office, and that case was dismissed on jurisdictional grounds.[5] Then, in 1971, in *Bivens v. Six Unknown Federal Narcotics Agents,*[6] the United States Supreme Court held that violations of individual constitutional rights by federal agents would give rise to an implied cause of action for damages.[7] On remand in *Bivens,* the United States Court of Appeals for the Second Circuit refused to grant the agents absolute immunity,[8] thus opening the door for consideration of presidential immunity. Subsequently, in 1980 a panel of the United States Court of Appeals for the District of Columbia held in *Halperin v. Kissinger,*[9] that no presidential

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[1] 102 S. Ct. 2690 (1982).

[2] "Immunity", in this context, has been defined by Prosser as follows: "An immunity . . . . avoids liability in tort under all circumstances, within the limit of the immunity itself; it is conferred, not because of the particular facts, but because of the status or position of the favored defendant; and it does not deny the tort, but the resulting liability." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 970 (4th ed. 1971) [hereinafter cited as PROSSER]. Dean Prosser has noted that the difference between an immunity and a privilege is "largely one of degree," since a privilege avoids liability "only under particular circumstances" where it is reasonable not to impose liability, thus defeating "the existence of the tort itself." *Id.*

"Absolute immunity," as used herein, is that immunity "designed to protect certain discretionary functions from even the burden of litigation." Freund, *The Supreme Court, 1973 Term — Foreword: On Presidential Privilege,* 88 HARV. L. REV. 13, 20 n.41 (1974). For a good general discussion of the term immunity, see Note, *Halperin v. Kissinger: The D.C. Circuit Rejects Presidential Immunity From Damage Actions,* 26 LOY. L. REV. 144, 144 n.1 (1980) [hereinafter cited as Note, *Halperin v. Kissinger*].

[3] Article II, § 4 of the United States Constitution does provide that the President may be removed from office by impeachment for certain crimes and misdemeanors. U.S. CONST. art. II, § 4.

[4] *See* United States v. Nixon, 418 U.S. 683, 706 (1974) (no absolute, unqualified Presidential immunity from judicial process under all circumstances); Mississippi v. Johnson, 71 U.S. 475, 501 (1866) (no Supreme Court jurisdiction of bill to enjoin President in performance of official duties). *See also* Note, *Halperin v. Kissinger, supra* note 2, at 144 n.1.

[5] *See* Nixon v. Fitzgerald, 102 S. Ct. 2690, 2706 n.1 (1982) (Burger, C.J., concurring) (citing Livingston v. Jefferson, 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8,411)). In *Livingston,* a lower federal court dismissed a suit against Thomas Jefferson for being improperly brought in Virginia, thus precluding the necessity of reaching any immunity issue. Livingston v. Jefferson, 15 F. Cas. at 663. *See infra* note 61 and accompanying text.

[6] 403 U.S. 388 (1971). *See infra* note 207.

[7] *Id.* at 390-97.

[8] Bivens v. Six Unknown Named Agents Of The Federal Bureau of Narcotics, 456 F.2d 1339, 1341 (2d Cir. 1972).

[9] 606 F.2d 1192 (D.C. Cir. 1979), *aff'd by an equally divided vote,* 452 U.S. 713 (1981). In *Halperin,* the Supreme Court was equally divided on the lower court's ruling. 452 U.S. at 713.

immunity exists cloaking the Chief Executive from civil damage liability.[10] In 1982, however, the United States Supreme Court in *Nixon v. Fitzgerald* held that the President of the United States is entitled to absolute immunity from civil damage liability predicated on his official acts, at least for implied causes of action.[11]

In *Nixon,* A. Ernest Fitzgerald, a management analyst with the Department of the Air Force, had testified before a congressional subcommittee in the closing months of the Johnson Administration about cost overruns and unexpected technical difficulties in the development of the C-5A air transport.[12] His testimony embarrassed Department of Defense officials,[13] and Fitzgerald was notified shortly thereafter that his "tenure" as a civil servant was being revoked.[14] Nearly a year after his testimony, Fitzgerald's job was abolished by presidential order and his employment terminated.[15] The Subcommittee on Economy in Government held hearings immediately thereafter to determine if

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The holding below therefore was affirmed, but apparently no precedent was established. This is evidenced by the *Nixon* Court's holding of absolute presidential immunity from civil damage liability, coupled with the Court's failure even to mention *Halperin* in its holding. *See infra* note 11 and accompanying text.

[10] Halperin v. Kissinger, 606 F.2d 1192, 1211 (D.C. Cir. 1979).

[11] Nixon v. Fitzgerald, 102 S. Ct. 2690, 2701 & n.27 (1982). The *Nixon* Court noted that its holding was limited to absolute immunity from civil damage liability in the absence of explicit affirmative action by Congress. *Id.* at 2701 n.27. Fitzgerald's complaint had stated implied causes of action under both the first amendment and two federal statutes. *See infra* note 33 and accompanying text. The *Nixon* Court assumed for the purpose of its opinion that such constitutional and statutory causes of action could be implied by Fitzgerald. Nixon v. Fitzgerald, 102 S. Ct. at 2701 n.27. The Court added, however, that it did not necessarily follow from that assumption that implied constitutional and statutory causes of action would run against the President. *Id.* The reason for this conclusion, the Court stated, was that these implied causes of action had to be considered *in light of the immunity doctrine. Id.* When looked at in light of the immunity doctrine, the Court found, these implied causes of action did not represent an express undertaking by Congress to deprive the President of absolute immunity. *Id.* By considering together the implied causes of action arising under the Constitution and federal statutes, the *Nixon* Court apparently concluded that one standard for finding absolute immunity for the President from civil damage liability applies to both types of implied causes of action.

[12] *See Economics of Military Procurement: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Comm.,* 90th Cong., 2d Sess. 199-202 (1968) (testimony of A. Ernest Fitzgerald).

[13] Nixon v. Fitzgerald, 102 S. Ct. 2690, 2694 n.1 (1982). Less than two months after this appearance, staff had prepared a memo for outgoing Secretary of the Air Force Harold Brown, detailing three ways to get rid of Fitzgerald, among them a "reduction in force," the method eventually used. *Id.*

[14] *See The Dismissal of A. Ernest Fitzgerald by the Department of Defense: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Comm.,* 91st Cong., 1st Sess. 2 (1969) (Statement of William Proxmire, Chairman, SEGJEC). Fitzgerald's tenure had been given to him shortly before the congressional hearing at which he testified about the C-5A. *Id.* Fitzgerald was later told that status had been granted by "computer error." *Id.*

[15] *See id.* On November 14, 1969, a general reorganization of the Department of the Air Force was announced with a reduction in defense and government manpower generally. This reorganization was to be effective January 5, 1970. Nixon v. Fitzgerald, 102 S. Ct. 2690, 2694 n.1 (1982).

this action was taken in retaliation for his testimony.[16] The press, which had given wide play to the earlier announcement of the job elimination action, also covered these hearings prominently.[17] At a December 8, 1969, press conference, President Nixon was asked about Fitzgerald's impending separation from government service and promised to look into the matter.[18] When Nixon proposed that Fitzgerald be reassigned, however, resistance was encountered within his administration.[19] On January 5, 1970, Fitzgerald left government employment without an offer of another position.[20]

Fitzgerald complained first to the Civil Service Commission.[21] When the Commission attempted to hold a closed hearing, however, Fitzgerald obtained an injunction to have a public hearing.[22] The public hearings commenced on January 26, 1973,[23] and on September 18, 1973, the Commission issued a decision determining the abolition of Fitzgerald's job to have been improper and recommending that he be returned to his old job, or a comparable one, and receive back pay.[24] Upon receiving what he deemed an inadequate job offer,[25] Fitzgerald filed an enforcement action in the United States District Court for

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[16] *Id.* These hearings, on November 17 and 18, 1969, were reported in *The Dismissal of A. Ernest Fitzgerald by the Department of Defense: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Comm.*, 91st Cong., 1st Sess. 1-216 (1969). In addition, 60 members of Congress signed a letter to the President protesting the "firing of this dedicated public servant" as a "punitive action." *Id.* at 115-16.

[17] Nixon v. Fitzgerald, 102 S. Ct. 2690, 2694 (1982). News media coverage led some staff members to recommend that the President direct the Secretary of Defense to find Fitzgerald another position of equal pay and stature. Petition for a Writ of Certiorari To The District of Columbia Circuit, Joint Appendix at 270a, Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982).

[18] Nixon v. Fitzgerald, 102 S. Ct. 2690, 2694 (1982). Subsequently, Nixon asked Chief of Staff H.R. Haldeman to arrange for Fitzgerald's assignment to another job in the Administration. *Id.* It also appears Nixon suggested to Budget Director Mayo that Fitzgerald be offered a job in the Bureau of the Budget. *Id.*

[19] *Id.* White House Aide Alexander Butterfield wrote an internal memorandum to H. R. Haldeman on January 20, 1970, questioning Fitzgerald's loyalty and recommending that Fitzgerald not be reassigned. *Id.*

[20] *Id.* at 2694 & n.1.

[21] *Id.* at 2695. In a letter dated January 20, 1970, respondent's attorneys submitted an appeal to the Civil Service Commission under Part 351, Subpart 1 of the Civil Service Regulations. Petition For a Writ of Certiorari To The United States Court of Appeals For the District of Columbia Circuit, Joint Appendix at 61a, Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982). Because there was a *prima facie* showing that the reduction in work force may have been personal, a hearing was scheduled. *Id.* at 61a.

[22] Nixon v. Fitzgerald, 102 S. Ct. 2690, 2695 (1982). The Commission convened a closed hearing on May 4, 1971. *Id.* Preferring to present his grievances in public, Fitzgerald brought suit and won an injunction allowing him to do so. *Id.* (citing Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972)).

[23] *Id.* at 2695. There was a great deal of publicity accorded the hearing, particularly over the testimony of Air Force Secretary Robert Seamans. *Id.* Seamans denied Fitzgerald had lost his job in a retaliatory move, but did concede that he had received "some advice" from the White House and therefore invoked executive privilege. *Id.*

[24] *Id.* at 2695-96. The Commission, however, specifically found that Fitzgerald had not been fired in retaliation for his congressional testimony. *Id.*

[25] *See id.* at 2696 n.17.

the District of Columbia, which culminated in a settlement agreement.[26] Still dissatisfied, he filed suit for damages in the same court, raising essentially those claims he had presented in the Commission and naming as defendants eight Defense Department officials, White House aide Alexander Butterfield, and other unnamed White House aides.[27] The court dismissed the action under the District of Columbia's three year statute of limitations.[28] The United States Court of Appeals for the District of Columbia affirmed as to all but one defendant — White House aide Butterfield — and remanded the proceedings to the federal district court.[29] On remand, following extensive discovery, Fitzgerald filed a second amended complaint in the district court on July 5, 1978.[30] In this complaint, filed slightly over eight years after his termination and complaint to the Commission, he added President Nixon and White House aide Bryce Harlow as defendants.[31] In March of 1980, the federal district court denied defendants' motion for summary judgment.[32] In denying the motion, the court stated that Fitzgerald had both statutory and constitutional causes of action.[33] The district court further ruled that former President Nixon was not entitled to absolute immunity.[34] Nixon then took a collateral appeal of the immunity decision to the United States Court of Appeals for the District of Columbia.[35] The court of appeals, without comment, granted Fitzgerald's motion to dismiss the appeal.[36] Nixon then brought a writ of certiorari to the United States Supreme Court.[37] The Supreme Court granted certiorari on June 22, 1981.[38]

In deciding *Nixon v. Fitzgerald,* the Supreme Court held that the President of the United States is entitled to absolute immunity from civil damage liability

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[26] *Id.* Under the terms of this agreement, the Air Force agreed to reassign Fitzgerald to his former position. *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 2697. By this date, an internal memorandum authorized by Butterfield had been published which recommended that Fitzgerald be "allowed to bleed" before being reassigned. Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, Joint Appendix at 85a, Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982).

[31] In this amended complaint, Fitzgerald alleged that Nixon was "totally aware of" and "approved" Fitzgerald's dismissal. *Id.* at 2697 n.19.

[32] *Id.* at 2697.

[33] *Id.* The district court ruled that the complaint stated not only a first amendment claim, but also an implied cause of action under 5 U.S.C. § 7211 (1976) which provides that an employee's right to furnish information to Congress cannot be abridged, and 18 U.S.C. § 1505 (1964), which makes it a felony to obstruct congressional testimony. *Id.* at 2697 n.20. The district court also held Fitzgerald stated a common law tort claim under District of Columbia law, but Fitzgerald abandoned this cause of action. *Id.* at 2697 n.20.

[34] *Id.* at 2697.

[35] *Id.*

[36] *Id.* The Supreme Court noted that in dismissing summarily the court of appeals apparently had relied on its recent 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).

[37] *See* 452 U.S. 959 (1981).

[38] *Id.*

predicated upon implied causes of action for violations of individual rights resulting from official acts.[39] The *Nixon* Court reasoned that the immunity granted was "functionally mandated" by the President's unique constitutional status and the separation of powers, and was supported by history and public policy.[40]

This casenote submits that *Nixon v. Fitzgerald* is in harmony with the Court's prior decisions regarding immunity for public officials, despite language apparently to the contrary. Although the Court spoke of the President's unique status, his singular importance and prominence and the separation of powers — thereby implying that *Nixon* was distinct from all other immunity decisions — this casenote will demonstrate that the Court's method of analysis and balancing of factors was actually consistent with those prior immunity decisions and that absolute presidential immunity was simply the highest step in the progression of varying immunities granted different government officials. To set the stage for the Court's decision in *Nixon v. Fitzgerald*, this casenote will begin by examining the history of presidential immunity from civil damage liability, focusing on the Constitutional Convention debates, the historical absence of civil suits against the President and the development of immunity for other public officials. Then, the Court's reasoning in *Nixon v. Fitzgerald* will be sketched, including briefly the reasoning of the concurring and dissenting justices. Next, the conclusion that *Nixon* was consistent with the Court's other immunity decisions and a natural continuation of those decisions will be explained and supported. Further, this casenote will show that the decision was in some respects unique, thus making the absolute immunity granted the President the strongest possible in our constitutional system of government. Finally, the casenote will suggest that the Court's decision in *Nixon* was a narrow one, and that government officials seeking absolute immunity in future cases will have to satisfy the stringent standards used by the *Nixon* Court in finding absolute immunity for the President.

I. The History of Presidential Immunity

In the absence of an express constitutional provision dealing with presidential immunity from civil damage liability,[41] the *Nixon* Court looked to the historical roots of presidential immunity for guidance.[42] Presidential immunity had been debated at the Constitutional Convention.[43] Also, there was a notable historic absence of civil suits against the President.[44] Moreover, the Court in the past had itself developed guidelines for creating varying im-

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[39] Nixon v. Fitzgerald, 102 S. Ct. 2690, 2701 & n.27 (1982). *See supra* note 11.
[40] *Id.* at 2701.
[41] *See supra* note 3 and accompanying text.
[42] Nixon v. Fitzgerald, 102 S. Ct. 2690, 2701, 2702 n.31 (1982).
[43] *Id.*
[44] *Id.* at 2703 n.33.

munities for lower level government officials.[45] An examination of these three areas, therefore, is important to an understanding of the historical status of presidential immunity at the time *Nixon* was decided.

A. *The Constitutional Convention Debates*

In the period immediately following the Revolutionary War, with the authority of the king and his colonial governors destroyed, governmental authority was vested to a great extent in the legislative branch.[46] A combination of administrative ineffectiveness and legislative excess, however, helped generate pressure at the Constitutional Convention for a strong executive in the new order being created.[47] Nonetheless, memories of the colonial experience lingered. While the system agreed upon granted the President substantial powers, it provided methods for restraining those powers as well.[48] Alexander Hamilton wrote that three procedural protections were envisioned to achieve this balance:[49] political checks in the form of legislative votes against presidential actions; accountability to the voting public at election time; and impeachment by the Senate for high crimes and misdemeanors.[50]

Convention delegates also considered — but never adopted — the idea of providing expressly for the absolute immunity of the President from civil damage liability.[51] Indeed, two sharply distinct views on presidential immunity emerged from the Convention debates. On the one hand, two delegates to the Convention, Senator Ellsworth and Vice President John Adams, declared that the President could not be subject personally to any judicial process whatever, since a single justice could then bring the entire government to a halt.[52] In accord with this view, a respected contemporaneous commentator, Justice Story, argued that there were implied, incidental powers that belonged only to the executive branch.[53] Story contended that among these incidental powers, by necessity, was the power to carry out executive duties unimpeded.[54] He therefore concluded that the President could not be interfered with through legal means while discharging the duties of his office, and was absolutely immune — at a minimum — from civil process.[55] Story added that the President

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[45] *Id.* at 2699.

[46] *See* C. THACH, THE CREATION OF THE PRESIDENCY 1775 - 1789, 25-75 (1922 ed.).

[47] *See id.* at 52, 74, 169.

[48] *See id.* at 169-73.

[49] *See* A. HAMILTON, THE FEDERALIST no. 77, at 481-82 (1923 ed.).

[50] *Id. See also* U.S. CONST. art. I, § 3; art. II, § 4.

[51] *See infra* notes 52, 57, 59-60 and accompanying text.

[52] *See* W. MACLAY, THE JOURNAL OF WILLIAM MACLAY, 163 (1927 ed.) [hereinafter cited as MACLAY].

[53] *See* 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 814, at 579 (1833 ed.) [hereinafter cited as STORY].

[54] *See id.*

[55] *See id.*

was accountable only to his country and himself in the exercise of his political power.[56] Adams and Ellsworth were in accord with Story on this point, stating that impeachment of the President was the only recourse and that no other process could be brought against him.[57] In addition, Thomas Jefferson argued that the President was not intended to be subjected to judicial process.[58] On the other hand, some participants in the Convention debates either stated or implied that the President would be as amenable to civil suit as any other citizen. Mr. Wilson at the Pennsylvania ratifying convention stated that the President was accountable at law both by suit as a private citizen and by impeachment as a public officer.[59] In addition, Senator Pinckney, who had been a delegate to the Convention, argued on the floor of the Senate in 1800 that, in contrast to the express immunity granted the legislature in the Constitution, no immunity was intended for the President.[60] Thus, perhaps the most that can be said of the Constitutional Convention debates was that they did not definitively settle the issue of presidential immunity from civil damage liability but rather provided arguments that both sides could and did use in *Nixon*.

B. *The Historical Absence of Civil Suits Against the President*

In its consideration of the historical background of presidential immunity, the *Nixon* Court found little precedential guidance due to the almost total absence of civil suits against the President prior to 1971. In fact in the nearly two hundred years from 1789 to 1971, only one case appears to have arisen in which a party sought civil damages from a President for his actions in office,[61] and it was dismissed for lack of jurisdiction.[62] In this century, prior to the

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[56] *See id.*

[57] *See* MACLAY, *supra* note 52, at 163.

[58] Nixon v. Fitzgerald, 102 S. Ct. 2690, 2700 n.31 (1982), (citing 10 THE WORKS OF THOMAS JEFFERSON, 404 (P. Ford ed. 1905)). When Chief Justice Marshall held that the President could be issued a *subpoena duces tecum* in United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807) (14,692d), Jefferson protested strongly and stated in a letter to the prosecutor of that trial:

> The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter and to imprisonment for disobedience if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south and east to west, and withdraw him entirely from his constitutional duties? The intention of the Constitution, that each branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the executive.

Nixon v. Fitzgerald, 102 S. Ct. at 2700 n.31.

[59] *Id.* at 2704 (White, J., dissenting).

[60] *Id.* at 2704 (White, J., dissenting).

[61] *See* Livingston v. Jefferson, 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8,411) which sought damages for an alleged trespass committed by a marshall at President Jefferson's order. *See supra* note 5 and accompanying text.

[62] Livingston v. Jefferson, 15 F. Cas. 660, 663 (C.C.D. Va. 1811) (No. 8,411).

holding in *Bivens v. Six Unknown Federal Narcotics Agents*[63] that federal officials are amenable to civil suit,[64] most such civil actions were brought against the United States or other officials within the administration, not against the President himself.[65] Immediately following the Supreme Court's decision in *Bivens*, a wave of civil damage actions were filed against President Nixon.[66] These actions were all dismissed on the grounds of absolute immunity,[67] until the decision in *Halperin* denied such immunity to the President.[68] In conclusion, case law on presidential immunity from civil damage liability was virtually nonexistent. In deciding *Nixon*, therefore, the Court looked for guidance to its past treatment of analogous controversies and settled on the analysis applied in the determination of the immunity accorded other government officials.

C. *The Development of Immunity for Public Officials*

The final factor providing guidance to the *Nixon* Court on the historical background of presidential immunity was the development at common law of immunity for members of the three branches of government. The Court has consistently recognized that both state and federal government officials are entitled to some form of immunity from suits for civil damages.[69] This immunity has been granted in two degrees — qualified and absolute — for different officials.[70] Qualified immunity applies generally to both state and federal govern-

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

[64] *Id.* at 390-97.

[65] *See, e.g.*, Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 583 (1952) (suit against Secretary of Commerce challenging constitutionality of Executive Order issued by President); Humphrey's Executor v. United States, 295 U.S. 602, 626 (1935) (suit against United States challenging power of President to remove commissioner of Federal Trade Commission); Myers v. United States, 272 U.S. 52, 176 (1926) (suit against United States to determine if President alone can remove judge).

[66] *See, e.g.*, Reese v. Nixon, 347 F. Supp. 314, 315 (C.D. Cal. 1972) (suit against Nixon for deprivation of constitutional rights by surveillance, false arrest and search and seizure); Atlee v. Nixon, 336 F. Supp. 790, 791 (E.D. Pa. 1972) (taxpayer suit against Nixon challenging constitutionality of expenditures for Vietnam War); Meyers v. Nixon, 339 F. Supp. 1388, 1389 (S.D.N.Y. 1972) (class suit against Nixon to enjoin expenditures for Vietnam War).

[67] *See supra* cases cited at note 66. *See also* Nixon v. Fitzgerald, 102 S. Ct. 2690, 2702 n.31 (1982).

[68] Halpering v. Kissinger, 606 F.2d 1192, 1211 (D.C. Cir. 1979), *aff'd by an equally divided vote,* 452 U.S. 713 (1981). (President has only qualified immunity in civil damage action). *See supra* note 9.

[69] *See* Butz v. Economou, 438 U.S. 478, 506-07 (1978) (Secretary of Agriculture has only qualified immunity when sued for constitutional violations); Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) (state governor has qualified immunity for official acts); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1871). (State judge has absolute immunity from civil suit for official acts).

[70] *See* Spalding v. Vilas, 161 U.S. 483, 498 (1896) (Postmaster General absolutely immune from common law suits for official acts); Pierson v. Ray, 386 U.S. 547, 554-55 (1967) (state judge absolutely immune from § 1983 suit). *But see* Butz v. Economou, 438 U.S. 478, 508 (1978) (Secretary of Agriculture has only qualified immunity in suit for constitutional violations); Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974) (state governor sued for deprivation of individuals' constitutional rights has only qualified immunity).

ment officials who are performing their official duties, even when they are sued for violations of constitutional rights.[71] This immunity protects the official when, in the view of the court, the official had reasonable grounds at the time and in the circumstances for a good faith belief that he was acting legally and within the scope of his duties.[72] Absolute immunity, on the other hand, is granted to certain state and federal government officials who performed especially sensitive functions.[73] It provides such officials a full exemption from liability for actions taken in the broad exercise of their official duties, regardless of bad faith or malicious intent.[74]

In determining the degree of the immunity to grant a particular official, the Court has looked to the nature of the duties performed, the type of action brought and the public interest behind the immunity. For example, in 1871, the Court held that judges are absolutely immune from civil actions for their judicial acts, even when those acts are done maliciously and in excess of their jurisdiction.[75] Similarly, in 1896, the Court held that the Postmaster General was absolutely immune from damages in a common law action based on his official acts.[76] In very broad language, the Court concluded that the interests of the people demanded this immunity.[77] This same absolute immunity was later extended to state legislators and judges even where the actions were for constitutional violations.[78] In 1974, however, the Court, in *Scheuer v. Rhodes*,[79] determined that State executive officials had only qualified good faith immunity where constitutional violations were alleged.[80] As later construed, *Scheuer* set

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[71] *See* Butz v. Economou, 438 U.S. at 508. *See also* Harlow v. Fitzgerald, 102 S. Ct. 2727, 2736 (1982) (presidential aides have qualified immunity for official acts); Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974) (state governor has qualified immunity when sued for constitutional violations).

[72] *See* Butz v. Economou, 438 U.S. at 507; Scheuer v. Rhodes, 416 U.S. at 247-48.

[73] *See* Butz v. Economou, 438 U.S. at 508-17 (exception to general rule of qualified immunity where official performs especially sensitive duties); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347-48 (1871) (judges need absolute immunity due to emotional impact of their decisions).

[74] *See* Bradley v. Fisher, 80 U.S. (13 Wall.) at 347.

[75] *Id.* at 347, 357.

[76] Spalding v. Vilas, 161 U.S. 483, 498 (1896).

[77] *Id.* The Court went on to state:

> In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint.

Id.

[78] *See, e.g.*, Tenney v. Brandhove, 341 U.S. 367, 372-79 (1951) (passage of 8 U.S.C. § 43 (1946) in the Ku Klux Klan Act of 1871 did not abrogate the privilege accorded to state legislators at common law); Pierson v. Ray, 386 U.S. 547, 553-55 (1967) (judges still have absolute immunity after passage of 42 U.S.C. § 1983).

[79] 416 U.S. 232 (1974).

[80] *Id.* at 247, 248.

up a two-tiered system of immunity defenses:[81] the first tier included most government officials and provided qualified, good faith immunity; the second tier included only those government officials with particularly sensitive duties who needed, and retained, a continued absolute immunity.[82]

In 1978, in *Butz v. Economou*,[83] the Court considered for the first time[84] the kind of immunity possessed by federal executive officials who are sued for constitutional violations.[85] *Butz* adopted the *Scheuer* division of immunities; most federal officials, the Court held, possess a qualified, good faith immunity, but some officials, notably judges and prosecutors, remain absolutely immune.[86] *Butz*, however, left open the question whether federal officials other than judges and prosecutors could show that public policy required that they be granted absolute immunity.[87] While *Halperin*, an appeals court decision, answered that question negatively as regards the President, the Supreme Court did not take a definitive position on the issue until its decision in *Nixon v. Fitzgerald*.[88]

With the Constitutional Convention debates not clearly settling the issue of whether the framers of the constitution intended absolute immunity for the President, and with the notable absence of prior civil suits against the President, the Court was left with but one method of analysis for determining the type of immunity it would grant the President in *Nixon*. That method was the application of the Court's prior immunity decisions to the facts presented in *Nixon* for a determination of whether the President should be protected by qualified or absolute immunity from civil damage suits.

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[81] Nixon v. Fitzgerald, 102 S. Ct. 2690, 2700 (1982). The *Scheuer* Court had held that state executive officials had only qualified immunity in § 1983 suits alleging violations of constitutional rights. Scheuer v. Rhodes, 416 U.S. 232, 247 (1974). Later decisions held, however, that certain officials with especially sensitive duties still needed absolute immunity. *See* Stump v. Sparkman, 435 U.S. 349, 359 (1978) (state judges have absolute immunity for all judicial acts); Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (state prosecutors are absolutely immune for all official acts). The *Butz* Court adopted the *Scheuer* rationale and held that qualified immunity applied to federal executive officials sued for constitutional violations. Butz v. Economou, 438 U.S. 478, 508-17 (1978). The *Butz* Court also recognized, however, that certain federal officials, due to the sensitive functions that they perform, require absolute immunity. *Id.* at 508. The *Nixon* Court is apparently the first court to describe the two different kinds of immunity as a "two-tiered division." Nixon v. Fitzgerald, 102 S. Ct. 2690, 2700 (1982). The description is an accurate one, however; the first tier includes most government officials and grants them qualified immunity, while the second tier grants absolute immunity to certain officials performing especially sensitive functions. *See infra* note 82 and accompanying text.

[82] *See* Butz v. Economou, 438 U.S. at 508-17 (1978).

[83] 438 U.S. 478 (1978).

[84] *See* Nixon v. Fitzgerald, 102 S. Ct. 2690, 2700 & n.25 (1982) (distinguishing the suit against the Postmaster General in Spalding v. Vilas, 161 U.S. 483 (1896) from *Economou* on the fact that the earlier case was predicated on common law and not the Constitution).

[85] Butz v. Economou, 438 U.S. 478, 485-517 (1978).

[86] *Id.* at 508.

[87] *See id.* at 506.

[88] *See supra* note 39 and accompanying text.

II. THE COURT'S REASONING IN *NIXON V. FITZGERALD*

A. *The Majority's Analysis*

In *Nixon*, after considering and rejecting two jurisdictional challenges,[89] the Supreme Court concluded that in *Butz v. Economou* it had left unresolved which federal officials other than judges and prosecutors could demonstrate that the nature of their duties mandated absolute immunity.[90] The Court stated that its approach to the issue, by necessity,[91] would be a combination of historical and public policy analysis of United States constitutional heritage and structure.[92] The Court noted that it limited its holding to civil damage

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[89] Nixon v. Fitzgerald, 102 S. Ct. 2690, 2697 (1982). First, Fitzgerald argued that the federal district court's order denying Nixon's motions to dismiss was not an appealable "case" properly "in" the court of appeals within the meaning of 29 U.S.C. § 1254 (1970). *Id.* at 2698. The language of § 1254 invests the Supreme Court with the authority to review cases "in" the court of appeals. *Id.* at 2697 n.22. Nixon sought review of an interlocutory order denying his claim to absolute immunity and the court of appeals dismissed for lack of jurisdiction. *See id.* at 2698 & n.23. Considering this attack, the *Nixon* Court noted there was no serious doubt of their ability to review a court of appeals decision to dismiss for lack of jurisdiction. *Id.* at 2698 n.3. The Court stated that, under the "collateral order" doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545-47 (1949), a small class of interlocutory orders can be immediately appealed to the court of appeals. *Id.* at 2698. The Court held that *Cohen* defined this class as embracing orders that "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." *Id.* (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)). The Court noted that *Cohen* also established that a collateral appeal of an interlocutory order must "present a serious and unsettled question." *Id.* (quoting Cohen v. Beneficial Loan Corp., 337 U.S. 541, 547 (1949)). The Court noted that it had twice before held that orders denying claims of absolute immunity are appealable under the *Cohen* criteria. *Id.* The *Nixon* Court determined that the instant case raised an important and unsettled question, since there was alleged a threatened breach of essential Presidential prerogatives under the separation of powers doctrine. *Id.* The Court therefore held that the case was indeed within its certiorari jurisdiction based on the "collateral order" doctrine of *Cohen*. *Id.*

Second, the plaintiffs in *Halperin*, as parties in interest in *Nixon*, challenged Fitzgerald's contention that an agreement between the parties to liquidate damages had rendered the controversy moot. *Id.* at 2699 n.24. Morton, Ina, David, Mark, and Gary Halperin made a Motion to Intervene and For Other Relief, arguing that the liquidation agreement was contrary to their interest in the pending case. *See id.* Under this agreement, Nixon paid Fitzgerald $142,000. *Id.* at 2699. In consideration, Fitzgerald agreed to accept liquidated damages of $28,000 if the Court ruled that Nixon was not entitled to absolute immunity. *Id.* If the decision upheld Nixon's immunity claim, no further payments would be made. *Id.* On this point, the Court held that the agreement, limited in nature as it was, left both parties with a considerable financial stake in the resolution of the question presented to the Court. *Id.* at 2698. The Court therefore denied the motion, declared the controversy to be live and moved on to the merits. *Id.* at 2699.

[90] *Id.* at 2700.

[91] This necessity was created by the fact that the Presidency did not exist through most of the development of common law. *Id.* at 2701.

[92] *Id.* In the past the Court noted, cases dealing with the immunity of public officials had been decided by reference to the Constitution, federal statutes and history. *Id.* at 2700-01. Where express congressional or constitutional guidance was absent, the Court continued, common law had also been utilized. *Id.* at 2701. The Court noted that in the past it had also weighed "concerns of public policy, especially as illuminated by our history and the structure of our government." *Id.* Since the creation of the Presidency antedated the development of most of the

liability resulting from implied causes of action, absent any explicit statutory right of action created by Congress.[93] The Court then proceeded to consider whether absolute immunity was dictated by the unique position created for the President in the Constitution of the United States,[94] what the proper scope of the absolute immunity afforded should be,[95] and whether this grant of immunity would deny aggrieved parties adequate relief.[96]

1. The President's Unique Constitutional Status

The Court began its analysis of presidential immunity by describing the unique position the President occupies in the constitutional scheme.[97] Article II of the United States Constitution, the Court observed, provides that the executive power be vested in the office of the President.[98] The Court then delineated the nature of this executive power, determining that the President's responsibilities were threefold. First, the Court noted, the President must faithfully execute the federal laws.[99] Second, the Court continued, the President must oversee the conduct of foreign affairs — an area in which particularly broad judicial deference must be granted.[100] Third, the Court explained, he must manage the Executive branch.[101] Thus, the Court concluded, the Constitution established the President as the chief constitutional officer of the executive branch and entrusted to him the government's most sensitive supervisory and policy making responsibilities.[102]

In light of these responsibilities, the *Nixon* Court rejected Fitzgerald's argument that the President is entitled only to the same qualified immunity granted to other state and federal executive officers.[103] What distinguished the President from those other officials, the Court reasoned, was his unique con-

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common law, the Court reasoned, any historical analysis must rely on the Constitution. *Id.* "Historical inquiry," the Court added, "thus merges almost at its inception with the kind of 'public policy' analysis appropriately undertaken by a federal court." *Id.* The Court concluded that "this inquiry involves policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers." *Id.*

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

[94] *Id.* at 2702, 2703.

[95] *Id.*

[96] *Id.*

[97] *Id.* at 2702.

[98] *Id.*

[99] *Id.* (quoting U.S. CONST. art. II, § 3).

[100] *See id.* (quoting Chicago and S. Airlines Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

[101] *Id.* The Court noted that this was a task for which "imperative reasons requir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties." *Id.* (quoting Myers v. United States, 272 U.S. 52, 134-35 (1926)).

[102] *Id.*

[103] *Id.* at 2702. Fitzgerald relied on the two cases granting qualified immunity only to governors and cabinet officers — *Butz* and *Scheuer*. *Id.* *See supra* notes 71-77 and accompanying text.

stitutional status.[104] The Court then specified two particular consequences stemming from this unique status. First, the Court stressed that the President, like judges and prosecutors for whom absolute immunity exists, deals with matters likely to arouse the most intense feelings.[105] Given the sensitive and far-reaching nature of the authority vested in the office, the Court noted,[106] the President is an easily identifiable target for civil suits.[107] The Court considered particularly persuasive the notion that this prospect of imminent suits might render the President unduly cautious in the discharge of his official duties.[108] This distraction from his duties, the Court reasoned, would be detrimental both to the President and, more importantly, to the nation.[109]

The second consequence of the President's unique status according to the Court was that the judicial branch had traditionally exercised singular restraint and deference in its dealings with him.[110] The Court noted that it had previously recognized that presidential privilege was rooted in the constitutional separation of powers.[111] The Court also determined, however, that limitations on this privilege were necessary.[112] Thus, the Court declared that the separation of powers doctrine does not bar every exercise of jurisdiction over the President.[113] Nevertheless, the Court stressed that before exercising jurisdiction a court must balance the constitutional interest served by doing so against the dangers of intrusion on the authority and functions of the Executive branch.[114] As a result, the Court continued, assumption of jurisdiction is warranted only where judicial action serves to maintain the separation of powers,

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[104] *Id.*

[105] *Id.* at 2703 (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967)).

[106] *Id.* at 2703.

[107] *Id.* The Court stated that these dangers are significant even absent numerous suits historically, since there was no cause of action before *Bivens* was decided in 1971. *Id.* at 2703 n.33.

[108] *Id.* at 2703 n.32. The Court quoted Judge Learned Hand in Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied,* 339 U.S. 949 (1950): "The justification for . . . [denying recovery] is that it is impossible to know whether the claim is well founded until the case has been tried, and to submit all officials, the innocent as well as the guilty, to the burden of trial and the danger of its outcome would dampen the arder of all but the most resolute. . . ." Nixon v. Fitzgerald, 102 S. Ct. 2690, 2703 n.33 (1982).

[109] *Id.* at 2703.

[110] *Id.* The Court noted that this tradition runs throughout Constitutional history. *Id.* at 2703 n.34 (citing Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1866) (court has no jurisdiction over bill to enjoin the President in performance of official duties); Kendall v. United States, 37 U.S. (12 Pet.) 524, 622 (1838) (President beyond reach of other branches except as regards impeachment)).

[111] *Id.* at 2704 (quoting United States v. Nixon, 418 U.S. 683, 708 (1974)).

[112] *See id.*

[113] *Id.* (citing United States v. Nixon, 418 U.S. 683, 708 (1974); United States v. Burr, 25 F. Cas. 187, 191, 196 (C.C.D. Va. 1807) (No. 14,694). *Cf.* Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Secretary of Commerce enjoined from carrying out direct presidential order)).

[114] *Id.* (citing Nixon v. General Services Admin., 433 U.S. 425, 443 (1977); United States v. Nixon, 418 U.S. 683, 703-13 (1974)).

not where such action derogates it.[115] Balancing those factors in *Nixon*, the Court held that a mere private suit for damages[116] based on the President's official actions did not warrant an exercise of jurisdiction.[117]

Chief Justice Burger wrote a separate concurrence to stress this separation of powers argument.[118] The Chief Justice emphasized that presidential immunity differed from that accorded judges and prosecutors, since absolute immunity for the President is constitutionally mandated by the independence of the co-equal branches,[119] while other forms of immunity derive from the common law.[120] Using a balancing test similar to the majority's,[121] the Chief Justice concluded that the necessity of preventing significant invasions of the executive function by the judiciary was far more important than the need to permit an individual civil action.[122] Burger therefore concurred in the Court's decision. The Court majority, having dealt with Fitzgerald's contention that limited immunity would suffice, next directed its attention to the boundaries within which the immunity it granted the President would be absolute.

2. The Scope of Absolute Immunity

The *Nixon* Court recognized that to keep the absolute immunity accorded the President within acceptable limits the boundaries of that protection must relate closely to the justifying purposes of the immunity itself.[123] Having determined that presidential immunity is mandated by the need to preserve the President's unique power and to respect a coordinate branch's independent authority, the *Nixon* Court reasoned that the scope of the protection need only be broad enough to secure those considerations.[124] Absolute immunity of the President in this situation, the Court noted, would therefore be limited to those acts relating to the particular functions of his office.[125] Nevertheless the Court

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[115] *Id.* (citing Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952)). In addition to maintaining the separation of powers, the Court stated that it will also find jurisdiction to vindicate the public interest in an ongoing criminal invesigation. *Id.* (citing United States v. Nixon, 418 U.S. 683 (1974)).

[116] The Court noted that it has historically recognized a lesser public interst in actions for civil damages than in criminal prosecutions. *Id.* at 2704 n.37 (citing United States v. Gillock, 445 U.S 360, 371-73 (1980); United States v. Nixon, 518 U.S. 683, 711-12 & n.19 (1974)).

[117] *Id.* at 2704. In footnote 37, the Court refuted the notion raised by the dissenters that every legal wrong gives rise to a remedy in civil damages, citing a variety of examples to the contrary. The Court concluded that "in this case it was clear at least that Fitzgerald was entitled to seek a remedy before the Civil Service Commission — a remedy of which he availed himself." *Id.* at 2704 n.37.

[118] *Id.* at 2706-09 (Burger, C.J., concurring).

[119] *Id.* at 2707 & n.2 (Burger, C.J., concurring).

[120] *Id.* at 2707 n.2 (Burger, C.J., concurring).

[121] *See id.* at 2708 (Burger, C.J., concurring).

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

[123] *Id.* at 2705.

[124] *Id.*

[125] *Id.*

made it clear that it would avoid drawing arbitrarily fine lines,[126] and would instead recognize absolute immunity within the "outer perimeter" of his official responsibility.[127]

Applying this limiting concept to the facts in *Nixon*, the Court concluded that President Nixon's actions lay well within "outer perimeter" of presidential authority.[128] The Court therefore rejected Fitzgerald's contention that, in allegedly firing him without cause, Nixon acted beyond his authority.[129] The Court also stated that it considered the version of the "functional comparability" test proposed by Fitzgerald and the dissenters to involve a highly intrusive and unnecessary inquiry into the President's motives.[130] The Court noted that the construction of the outer perimeter urged by Fitzgerald, which would exclude from its protection any government official acting contrary to a federal statute, would render absolute immunity meaningless.[131] The Court added that the President surely had the authority to tell the Secretary how to run the Air Force.[132] Having described the scope of presidential immunity, the Court answered the dissenters' charges that this immunity would place the President above the law by detailing other methods of remedying abuses of executive authority.[133]

3. The Existence of Other Remedies

The Court pointed to the existence of alternative remedies, designed to protect the nation, as both a safeguard against the President being above the law and as further justification for allowing absolute presidential immunity in *Nixon v. Fitzgerald*.[134] These alternatives, the Court noted, had also been recognized as justification in previous absolute immunity decisions.[135] The Court identified a number of these alternatives, including impeachment,[136] the

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[126] *Id.* (citing Spalding v. Vilas, 161 U.S. 483, 498 (1896) (privilege extends to all matters "committed by law to [an official's] control or supervision"); Barr v. Matteo, 360 U.S. 564, 575 (1959) (action within outer perimeter of job justified privilege); Stump v. Sparkman, 435 U.S. 349, 363 & n.12 (1978) (judicial privilege extends to acts outside "the normal attributes of a judicial proceeding.")).

[127] *Id. See infra* note 168 and accompanying text.

[128] *Id.*

[129] *Id.* Fitzgerald cited 5 U.S.C. § 7512(a) (1976), which allows firing only for such cause as will promote the efficiency of the service, and argued that since Congress granted this protection, no federal official could ignore it and be within the outer perimeter. *Id.*

[130] *Id.* Fitzgerald said he was fired in retaliation for his testimony to Congress. *Id.* The Air Force called it an efficiency move. *Id.* If Nixon ordered this move, the Court would then have to examine his motives in so doing. This the Court was reluctant to do. *Id. See supra* note 165 and accompanying text.

[131] *See id. See supra* note 127.

[132] *Id.* (citing 10 U.S.C. § 8012(b) (1970)).

[133] *Id.* at 2706 & n.41.

[134] *See id.* at 2706.

[135] *Id.* at 2706 n.38 (citing Imbler v. Pachtman, 424 U.S. 409, 428-29 (1976) (immunity of prosecutors does not leave public powerless)).

[136] *Id.* at 2706. The Court noted that this same remedy applies to judges and con-

constant scrutiny of the press,[137] and the deterrent effect of congressional oversight.[138] Furthermore, the Court stated that a President not only is concerned with possible re-election and how history will regard him, but also needs to maintain prestige to govern effectively.[139] In light of these checks on presidential abuses of power and the limitation of the scope of the immunity to official functions,[140] the *Nixon* majority disagreed with the dissenting justices that their holding places the President above the law.[141]

Due to the President's unique status and the separation of powers in the Constitution, therefore, the Court held that the President was absolutely immune from civil damage liability predicated upon the violation of an individual's constitutional, non-statutory rights.[142] Thus, the Court reversed the decision of the court of appeals and remanded the case for action consistent with its opinion.[143]

B. *The Dissenters' Analysis*

Justice White, joined by Justices Brennan, Marshall and Blackmun, dissented in *Nixon v. Fitzgerald*.[144] The dissenters declared that the majority's grant of absolute immunity to all actions within the outer perimeter of the President's duties — rather than to just specific presidential functions which demanded such immunity — was contrary to the holding in *Butz*[145] that absolute immunity attaches only to specific functions and not to the office of the official involved.[146] The dissenters contrasted the absolute immunity granted the President by the Court with that granted judges and prosecutors. The immunity of judges and prosecutors, the dissenters contended, applies only to their specific, respective functions and is, therefore, not absolute.[147] The Court, according to the dissenters, had abandoned the functional analysis of immunity used in all prior decisions and had substituted a subjective policy

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gressmen. *Id.* at 2706 n.39 (citing Kaufman, *Chilling Judicial Independence,* 88 YALE L.J. 681, 690-706 (1979); U.S. CONST. art. I, § 5, cl. 2).

[137] *Id.* at 2706.

[138] *Id.* The Court noted that the House Judiciary Committee had already begun impeachment proceedings when Nixon resigned. *Id.* at 2706 n.40.

[139] *Id.* at 2706.

[140] *Id.* at 2701.

[141] *Id.* at 2706 & n.41. The Court, responding to the dissenters' argument that absolute immunity would make the President above the law, concluded that an official was not above the law simply because a particular remedy does not apply to him. *Id.*

[142] *Id.* at 2701 & n.27.

[143] *Id.* at 2706.

[144] *Id.* at 2710 (White J., dissenting).

[145] 438 U.S. 478 (1978). Justice White authored the Court's opinion in *Butz*.

[146] Nixon v. Fitzgerald, 102 S. Ct. 2690, 2710 (1982). (White, J., dissenting). The dissenters added that the decision "... makes no effort to distinguish categories of presidential conduct that should be absolutely immune from other categories of conduct that should not qualify for that level of immunity." *Id.* (White, J., dissenting).

[147] *Id.* (White, J., dissenting).

choice.[148] The Court had supported that policy choice, the dissenters noted, with both history and the constitutional tradition of the separation of powers.[149] History, however, did not support absolute immunity in the view of the dissenters; they quoted Senator Pinckney and Mr. Wilson, both members of the Constitutional Convention, to show that no immunity was intended for the President.[150] As for the constitutional separation of powers argument, the dissenters argued that the Court had actually combined it with the public policy argument for absolute immunity, rather than using it to support that policy argument.[151] According to the dissent, the absolute immunity granted the President places the President above the law.[152] The real test, in this case as in past cases, the dissenters concluded, was to examine the challenged individual function of the official and to weigh the need for absolute immunity for that function only against the right of the individual plaintiff to a civil remedy.[153]

According to the dissenters, the only question that needed to be determined, therefore, was whether dismissal of employees is a constitutionally assigned executive function which would be significantly impaired if a civil damage remedy was allowed.[154] The answer to that question, the dissenters stated, was no.[155] Rather, the dissenters continued, since Congress had intervened statutorily to protect federal employees,[156] public policy actually suggested that the executive branch be restrained in this area.[157] Nor, added the dissenters, should the President be absolutely immune from a *Bivens* implied right of action,[158] since the *Butz* decision recognized that absolute immunity for all government officials in an implied cause of action would drain *Bivens* of all

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[148] *Id.* at 2712 (White, J., dissenting).

[149] *Id.* (White, J., dissenting). The dissenters therefore read the decision to be "a constitutional pronouncement — absolute immunity for the President's office is mandated by the Constitution." *Id.* (White, J., dissenting). Despite the fact that the majority had disclaimed this result, *see id.* at 2701 n.27, the dissenters stated that the decision could only be read that way. *Id.* at 2712. (White, J., dissenting).

[150] *Id.* at 2715, 2716. (White, J., dissenting). The dissenters protested that the Court's approach assumed immunity and put the burden on Fitzgerald to demonstrate that it did not exist. *Id.* at 2714 n.13. (White, J., dissenting). The dissenters declared nothing in the debates specifically suggested that notion. *Id.* (White, J., dissenting). The dissenters further argued that the focus of the entire debate had been on situations where the President had committed wrongs against the state, not against individuals. *Id.* at 2714. (White, J., dissenting). Overall, the dissenters concluded that history contributed nothing to the immunity issue, and that the Court had conceded this by dropping its historical analysis into a footnote. *Id.* at 2717. (White, J., dissenting).

[151] *Id.* at 2717. (White, J., dissenting).

[152] *Id.* at 2711. (White, J., dissenting).

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

[154] *Id.* (White, J., dissenting).

[155] *Id.* (White, J., dissenting).

[156] *See* 5 U.S.C. § 7211 (1976); 18 U.S.C. § 1505 (1964). *See supra* note 33.

[157] *See* Nixon v. Fitzgerald, 102 S. Ct. 2690, 2721-22 (1982). (White, J., dissenting).

[158] *See supra* note 6 and accompanying text. *See infra* note 207 and accompanying text.

meaning.[159] In conclusion, the dissenters stated that no function deserving of absolute immunity was involved in this case.[160]

III. THE *NIXON* HOLDING IN THE CONTEXT OF PREVIOUS IMMUNITY DECISIONS

Although its language regarding the President's "unique status" initially may appear inconsistent with previous Court pronouncements on the immunity accorded government officials, *Nixon v. Fitzgerald* is actually in harmony with those decisions. As is the case with the President in *Nixon*, past decisions have generally limited the immunity granted — whether qualified or absolute — to actions taken in the performance of the particular official's duties.[161] One critical distinction between the two types of immunity is that under qualified immunity, the courts must determine whether "good faith" exists.[162] Thus, a defendant official must answer pleadings and bear discovery expenses even if he eventually succeeds in getting the case dismissed. Conversely, under absolute immunity, the defendant official's liability is precluded immediately and entirely, and the burden of litigation is avoided.[163] In deciding whether to grant qualified or absolute immunity, the Supreme Court has consistently looked at the public interest behind the immunity accorded the particular official.[164]

The Court's holding in *Nixon* was predictable, therefore, because of the functional comparability of the duties of the President to those of other officials in which the Court had found sufficient public interest to warrant absolute immunity.[165] Moreover, the *Nixon* Court's separation of powers argument simply

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[159] Nixon v. Fitzgerald, 102 S. Ct. 2690, 2722 (1982) (citing Butz v. Economou, 438 U.S. 478 (1978)).

[160] *Id.* at 2721, 2723 (White, J., dissenting). Justice Blackmun, joined by Justices Brennan and Marshall, also wrote a separate dissent. These dissenters contended that the settlement arrangement between the parties if it had been fully disclosed to the Justices, would have led to the denial of certiorari. *Id.* at 2727 (Blackmun, J., dissenting). They therefore would have dismissed the writ as being improvidently granted. *Id.* (Blackmun, J., dissenting). Since dismissal did not occur, however, all of these dissenters joined in the reasoning of Justice White's dissent. *Id.* (Blackmun, J., dissenting).

[161] Qualified and absolute immunity are the two types of immunity available for government officials. *See supra* notes 69-72 and accompanying text. Qualified immunity applies generally to both state and federal government officials in the performance of their official functions and protects them when they act in good faith. Butz v. Economou, 438 U.S. 478, 508-17 (1978). Absolute immunity, in contrast, is granted to certain state and federal government officials who perform especially sensitive functions. *Id.* at 508. It provides a full exemption from liability for actions taken in the broad exercise of their official duties, regardless of bad faith or malicious intent. *See* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871).

[162] *See supra* note 161 and accompanying text.

[163] *See* PROSSER, *supra* note 2, at 970.

[164] *See* Butz v. Economou, 438 U.S. 478, 508 (1977).

[165] Nixon v. Fitzgerald, 102 S. Ct. 2690, 2703 (1982). The Court arrived at its decision by way of a "functional comparability" test. *Id.* at 2701 & n.27 (1982). Under this approach, first used by the Court in Butz v. Economou, 438 U.S. at 508, the Court compares the characteristics of the office of the defendant official to those of officials it has previously accorded

buttressed the absolute immunity holding as a second, distinct rationale for according the President such protection. Indeed, Supreme Court decisions regarding immunity of public officials follow a logical progression from a threshold consideration of whether any immunity exists, to an analysis of whether that protection is the qualified immunity granted most officials or the absolute immunity accorded certain officials where the public interest demands it.[166] A detailed analysis of this progression, along with an examination of the factors pertinent to each level of immunity, reveals that *Nixon v. Fitzgerald* fits within the absolute immunity doctrine established by the Court.

A. *The Threshold Inquiry into the Existence of Immunity*

Running consistently throughout the Court's prior immunity decisions is the notion that immunity, either qualified or absolute, would only be granted to a public official who was performing an official function of his office. In *Bradley v. Fisher*[167] the Court considered the immunity granted a judge at common law. The Court noted that absolute immunity would only be denied when the judge acted knowingly in the clear absence of any jurisdiction at all, not merely when he acted in excess of his jurisdiction.[168] In *Spalding v. Vilas*[169] the Court examined the immunity of the Postmaster General from civil suit in a common law action.[170] The Court implied that when the Postmaster General acted in matters manifestly beyond his authority he would not be protected by immunity.[171] Similarly, in *Imbler v. Pachtman*,[172] involving a prosecutor seeking immunity from a civil suit, the Court concluded that the prosecutor's immunity would be absolute — like that accorded judges — as long as he acted within the scope of his duties.[173]

The Court has stressed, however, that the boundary line delimiting official action will not be drawn arbitrarily, but will allow a broad discretionary scope. For example, in *Bradley v. Fisher*, the absolute immunity granted by the Court applied even when the judicial acts were done maliciously and in excess of the judge's jurisdiction.[174] Likewise, in *Spalding v. Vilas*, the Court stated that actions more or less connected with general matters committed by law to

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absolute immunity, such as judges and prosecutors. Nixon v. Fitzgerald, 102 S. Ct. at 2703. In situations where the official demonstrates that public policy interests equal to those justifying absolute immunity for judges and prosecutors favor application of that immunity to his office, absolute immunity will be granted. *Id.*

[166] *See, e.g.*, Butz v. Economou, 438 U.S. at 485-517; Scheuer v. Rhodes, 416 U.S. 232, 238-50 (1974).

[167] 80 U.S. (13 Wall.) 335 (1871).

[168] *Id.* at 351.

[169] 161 U.S. 483 (1896).

[170] *Id.* at 484, 498-99.

[171] *Id.*

[172] 424 U.S. 409 (1976).

[173] *Id.* at 416, 422-31.

[174] Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1871).

the Postmaster General's supervision were protected by absolute immunity.[175] Furthermore, in *Barr v. Matteo*,[176] where former employees of a government agency sued the agency's deputy director for libel, the Court found that since the deputy director's actions were taken within the outer perimeter of his duties, absolute immunity was triggered.[177] Although the Court has not defined precisely where it will draw the line in any of these cases, its method of analysis in determining absolute judicial liability can be applied to give some indication as to what the outer perimeter of absolute presidential immunity might be.

In the Court's analysis of judicial immunity, its initial inquiry in determining whether a judge will have absolute immunity in civil damage actions is a jurisdictional one.[178] As long as a judge does not act in the clear absence of jurisdiction, he will have absolute immunity for his judicial acts even when those acts are malicious and in excess of jurisdiction.[179] To determine whether the judge's challenged acts are "judicial," however, an additional analytical step is necessary.[180] The Court must examine both the nature of the act itself to determine whether it is a function normally performed by a judge, and the expectations of the parties involved to determine whether they dealt with the judge in his official capacity.[181] If any jurisdiction over the challenged act exists, and that act is a "judicial" one, the Court will grant the judge absolute immunity.[182] Thus, a longstanding line of immunity decisions by the Court establish the threshold inquiry to be whether the acts sued upon lie within the broad scope of duties committed to the defendant official's responsibility.

In *Nixon v. Fitzgerald*, the Court utilized a similar method of analysis when it recognized presidential immunity for official acts within the outer perimeter of that office's responsibility[183] and then found that the President had acted well within this outer perimeter.[184] In so doing, the Court rejected Fitzgerald's contention that, because Congress had granted legislative protection to government employees, no federal official could fire him without cause.[185] Instead, the Court determined that the President was authorized to prescribe how the Air Force would be run, and this authority covered reorganizations and reductions in force.[186] Since the President in *Nixon* acted under statutory authority

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[175] Spalding v. Vilas, 161 U.S. 483, 498-99 (1896).

[176] 360 U.S. 564 (1959).

[177] *Id.* at 575.

[178] *See* Note, *Judicial Immunity: Developments in Federal Law*, 33 BAYLOR L. REV. 350, 355 (1981).

[179] *Id.*

[180] *Id.* at 354.

[181] *Id.*

[182] *Id.* at 355.

[183] Nixon v. Fitzgerald, 102 S. Ct. 2690, 2705 (1982).

[184] *Id.*

[185] *Id.*

[186] *Id.* (citing 10 U.S.C. § 8012(b) (1970)).

enacted to define his constitutional power,[187] he had jurisdiction over the challenged action and was acting in an official executive capacity. The negative implication of the *Nixon* Court's reasoning, however, is that, if the President had acted knowing that no constitutional or statutory power existed, or that his actions were not among those official functions normally performed by a president, he would not have been protected by absolute immunity. Moreover, the Court specifically stated that prior immunity cases had limited the officials' absolute immunity to acts in performance of the particular assigned functions of their offices.[188] In finding that some form of immunity existed, the Court had therefore apparently utilized the same limitations established in its prior immunity decisions to find that the President in *Nixon* had acted within the outer perimeter of his official duties. The presence of the separation of powers argument in *Nixon* does not seem to have affected the scope of the outer perimeter of the immunity granted the President, since the delineation of the outer perimeter arose in prior immunity decisions unaffected by separation of powers concerns.[189]

B. *The Subsequent Consideration of the Type of Immunity*

The more difficult question facing the Court was the kind of immunity to grant the President. Fitzgerald argued that the President was entitled to only the qualified immunity granted governors and cabinet officers.[190] The Court rejected this argument and instead pointed to the President's unique status and the constitutional separation of powers doctrine as justification for granting the President absolute immunity.[191] The *Nixon* Court's grant of absolute immunity can be understood best by first examining the two major cases finding qualified immunity for most government officials, then briefly reviewing the cases granting absolute immunity to certain other government officials and finally comparing *Nixon* with both sets of cases to show that the President falls squarely within the category of officials protected by absolute immunity.

1. The Qualified Immunity Category

In *Scheuer v. Rhodes*,[192] representatives of the estates of the students killed in demonstrations at Kent State University sued the Governor of Ohio and others

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[187] *Id.*

[188] *Id.*

[189] This is not to say that the separation of powers doctrine is not an important element of *Nixon*. *See infra* note 303 and accompanying text. The separation of powers doctrine helped lead the Court in *Nixon* to *grant* absolute immunity to the President. *See* Nixon v. Fitzgerald, 102 S. Ct. at 2702-04. The doctrine was not needed, however, to *define* the boundaries of that grant, since those boundaries came from the common law.

[190] *Id.*

[191] *Id.* at 2702-04

[192] 416 U.S. 232 (1974).

under a federal civil rights statute — 42 U.S.C. § 1983 (section 1983)[193] — for calling out the National Guard and ordering performance of acts that resulted in student deaths.[194] The plaintiffs argued that the Governor had violated the constitutional rights of the deceased students by his official acts.[195] The Governor raised the defense of absolute immunity.[196] The Court held that the protection accorded a state executive officer for his official acts is not absolute, but instead is a qualified, good faith immunity.[197] In defining this qualified immunity, the Court stated that an executive officer will be immune from liability for his official acts if he had reasonable grounds under all the facts and circumstances existing at the time of his action to form a good faith belief in the validity of his conduct.[198] To grant absolute immunity and make the official's actions judicially unreviewable, the Court noted, would drain section 1983 of meaning.[199]

Standing alone, *Scheuer v. Rhodes* presumably would have had little impact on the decision in *Nixon v. Fitzgerald*. Since the *Scheuer* Court's analysis focused on the immunity granted a state official acting under color of state authority, the case could have been readily distinguished from Fitzgerald's causes of action against a federal executive official in *Nixon*. In *Butz v. Economou*,[200] however, the Court considered for the first time the type of immunity granted federal executive officials sued for constitutional violations,[201] and adopted the *Scheuer* rationale.[202] In *Butz*, the United States Department of Agriculture had tried unsuccessfully to revoke or suspend the registration of Economou's commodity futures commission company.[203] Economou then filed an action for damages against the Secretary and others, alleging that by instituting unauthorized proceedings against him, those federal officials had violated a variety of his constitutional rights.[204] The *Butz* Court held that in a suit for

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[193] 42 U.S.C. § 1983 (1976). Section 1983 makes every "person" liable who, under color of state law, deprives another person of his civil rights. 42 U.S.C. § 1983 (1976).

[194] Scheuer v. Rhodes, 416 U.S. 232, 234-35 (1974).

[195] *Id.*

[196] *Id.*

[197] *Id.* at 247-48. The *Scheuer* Court noted that while the legislative branch was expressly granted absolute immunity in Article I, Section 6 of the Constitution, immunity for the executive and judicial branches remained a common law function. *Id.* at 241 (citing Spalding v. Vilas, 161 U.S. 483, 498-99 (1896)). The public interest in decisive action by government officials required some immunity, *id.* at 242, but the legislative history of section 1983 indicated that the immunity should not be absolute. *Id.* at 243 (citing Monroe v. Pape, 365 U.S. 167, 184 (1961)).

[198] *Id.* at 243.

[199] *Id.* at 248.

[200] 438 U.S. 478 (1978).

[201] Nixon v. Fitzgerald, 102 S. Ct. 2690, 2700 (1982). The *Nixon* Court, however, did distinguish Spalding v. Vilas, 161 U.S. 483 (1896), on the fact that the *Spalding* suit (against the Postmaster General) was based on a common law, and not a constitutional, cause of action. *Id.* at 2700 n.25.

[202] Butz v. Economou, 438 U.S. 478, 507 (1978).

[203] *Id.* at 480-81.

[204] *Id.* at 481-83.

damages based on an alleged unconstitutional action, federal executive officials acting in the scope of their official duties are entitled only to the qualified immunity specified in *Scheuer v. Rhodes*.[205] The Court noted that exceptions would be made to grant certain officials — such as judges and prosecutors — absolute immunity when it was demonstrated that such protection is essential to the public interest.[206] The Court found that *Bivens v. Six Unknown Federal Agents*[207] had created an implied civil damage remedy against federal agents for constitutional violations wherein the agents had only qualified immunity.[208] Just as the *Scheuer* Court had granted state executive officials only qualified immunity to preserve the meaning of a section 1983 action,[209] the *Butz* Court limited the immunity granted federal officials to preserve the cause of action created in *Bivens*.[210] The Court reasoned that while public policy needs and public interest allowed for qualified immunity to protect officials in the vigorous exercise of discretionary, official authority,[211] there would be no protection for an official knowingly acting outside statutory or constitutional limitations.[212] The *Butz* Court stated, therefore, that the qualified, good faith immunity detailed in *Scheuer* would protect all federal officials generally.[213]

2. The Absolute Immunity Category

While limiting its holding to the immunity granted the officials before it, the *Butz* Court recognized that certain officials, including but not limited to judges and prosecutors, would have special duties requiring absolute immunity.[214] The Court noted, however, that those federal officials seeking absolute immunity would bear the burden of showing that public policy requires the application of the broader immunity.[215] Moreover, the *Butz* Court declared that officials seeking absolute immunity must demonstrate the functional com-

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[205] *Id.* at 507. Both *Butz* and *Nixon* involve constitutional actions against government officials. Spalding v. Vilas, 161 U.S. 483 (1896), granting the Postmaster General absolute immunity in a common law suit, has never been overruled and is apparently still good law. If, therefore, a government official were to be sued on common law grounds, it appears that the official would still be absolutely immune.

[206] *Id.* at 508-09.

[207] 403 U.S. 388 (1971). In *Bivens,* federal narcotics agents, without a warrant or probable cause, searched Bivens' apartment and arrested him on a narcotics charge. *Id.* at 389. The *Bivens* Court held that there was an implied federal cause of action under the fourth amendment against the federal officials. *See id.* at 397.

[208] *See* Butz v. Economou, 438 U.S. 478, 486 (1978).

[209] Scheuer v. Rhodes, 416 U.S. 232, 248 (1974).

[210] Butz v. Economou, 438 U.S. 478, 501 (1978). In so doing, the Court adopted the reasoning of various federal courts of appeals that it would be incongruous and confusing to develop different standards of immunity for state officials in section 1983 actions and federal officials sued on similar grounds in direct constitutional actions. *Id.* at 499, 500.

[211] *Id.* at 506.

[212] *See id.* at 506-07.

[213] *Id.* at 507.

[214] *Id.* at 508-09.

[215] *Id.* at 506.

parability of their duties to those officials — judges and prosecutors — previously granted absolute immunity; an official's level in government will not alone be sufficient.[216] To demonstrate adequately that the President's duties are indeed functionally comparable to those officials previously granted absolute immunity, it is first necessary to review briefly prior absolute immunity cases and focus on the facts distinguishing them from qualified immunity cases.

In *Bradley v. Fisher*,[217] an attorney brought a civil suit against a state judge for striking his name from the rolls of the attorneys allowed to practice in the criminal court of the district.[218] The Supreme Court held that judges are not liable in civil actions for such judicial acts, even when done maliciously and in excess of their jurisdiction.[219] The Court stated that this principle of absolute immunity obtains for judges in all countries with a well-ordered system of jurisprudence,[220] and that it had deep roots in the common law[221] and the English courts.[222] The Court added that the motives of the judge are irrelevant.[223] The historical reasoning behind granting judges this immunity, the *Bradley* Court noted, was that judges deal with those controversies involving not only great amounts of money, but also the liberty of the parties, both of which tend to excite the most intense feelings.[224] If civil actions could be maintained against judges, the Court continued, their independence in emotional cases would be destroyed and the public interest in that independence harmed.[225] The Court found that in the United States, judges are responsible only to the people[226] and if their actions are corrupt or malicious, judges are subject to impeachment.[227] Thus, so long as a judge acts within the outer boundaries of his jurisdiction — as opposed to knowingly acting without any jurisdiction at all[228] — the *Bradley* Court concluded that absolute immunity would bar civil damage liability[229] and impeachment would be the sole remedy.[230]

These considerations raised in *Bradley* — that the decisions of certain public officials have far-reaching emotional impact, and that the greatest public interest exists in providing such officials with maximum independence to act

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[216] *Id.* at 511-12.
[217] 80 U.S. (13 Wall.) 335 (1871).
[218] *Id.* at 336-37.
[219] *Id.* at 347, 357.
[220] *Id.* at 347.
[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] *Id.* at 348.
[225] *Id.* at 348-49.
[226] *Id.* at 350.
[227] *Id.*
[228] *Id* at 352, 353.
[229] *See id.* at 347.
[230] *Id.* at 354.

boldly and decisively — run consistently through subsequent cases granting absolute immunity. In *Spalding v. Vilas*,[231] the Court granted the Postmaster General absolute immunity from suits founded on common law actions, finding that the same general public reasons which demanded absolute immunity for judges mandated absolute immunity for executive officials.[232] The Court added that to hold otherwise would seriously cripple the proper and effective administration of public affairs as entrusted to the executive by the people.[233] Moreover, in several later cases, the Court indicated that the passage of 8 U.S.C. § 43 and its later codification 42 U.S.C. § 1983, which stemmed from an 1871 Act designed to effectuate the fourteenth amendment[234] did not abrogate the absolute immunity historically accorded certain public officials in the public interest.[235] The Court stressed the public interest in courageous, independent actions by such government officials[236] as well as the potential dangers to the public which could result if civil suits were to distract such officials from the performance of their public duties.[237]

3. The President's Immunity Category

The Court in *Nixon v. Fitzgerald* correctly found that the President, under the *Butz* test,[238] had demonstrated the functional comparability of his duties to those of judges and prosecutors, officials previously granted absolute immunity. The President has the broadest powers and deals with matters exciting the most intense feelings of any official in our constitutional system of government, far more so than judges and prosecutors.[239] The Constitution specifically assigns the President very important duties, including management of the Executive branch,[240] command of the armed forces[241] and enforcement of the federal laws.[242] In addition, the President, arguably, today represents the national interest — "the people" in our constitutional form of government.[243] He

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[231] 161 U.S. 483 (1896).

[232] *Id.* at 498-99. *See supra*, note 214.

[233] *Id.*

[234] The Ku Klux Klan Act of 1871, § 99, 16 Stat. 433.

[235] *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409, 420-31 (1976) (state prosecutor absolutely immune from liability under section 42 U.S.C. § 1983 (1976) for prosecutorial functions); Pierson v. Ray, 386 U.S. 547, 553-55 (1967) (state judge absolutely immune from suits under 42 U.S.C. § 1983 for judicial acts); Tenney v. Bradhove, 341 U.S. 367, 376 (1951) (state legislators absolutely immune from civil action after the passage of 8 U.S.C. § 43 (1946), the predecessor of § 1983).

[236] Imbler v. Pachtman, 424 U.S. 409, 423 (1976).

[237] *Id.*

[238] *See supra* notes 214-15 and accompanying text.

[239] *See infra* notes 247-58 and accompanying text.

[240] *See* U.S. CONST. art. II, § 1.

[241] *Id.* art. II, § 2.

[242] *Id.* art. II, § 3.

[243] R. PIOUS, THE AMERICAN PRESIDENCY 48 (1979) [hereinafter cited as PIOUS]. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 633 (1952) (Douglas, J., concurring).

claims, therefore, the sovereign powers of the nation, including the vast residuum of federal powers that are neither enumerated nor constitutionally assigned to any branch and often succeeds in attaining those powers.[244] This combination of constitutionally assigned and prerogative powers[245] covers a broad range of domestic and foreign policy matters, and involves the President in a great many decisions on highly sensitive issues.[246] A brief description of those matters with which the President is involved highlights the scope and widespread effect of his official acts.

The Constitution charges the President with the duty of making a State of the Union address to Congress,[247] a duty which has become an annual statement of the foreign and domestic policy goals of the President.[248] Shortly after this address the President is required by congressional act[249] to submit to Congress for approval the executive budget, compiled by the Office of Management and Budget to carry out the President's goals.[250] This authority to control the budget, if approved in a form similar to the form submitted, is a vital domestic power of the President.[251] If the Chief Executive can control spending levels, he can better control the departments and agencies that make up the Executive branch, distribute agency funds to allies in the states and thereby influence national fiscal policy.[252]

It is in the field of foreign affairs, however, that the President is granted the most sweeping powers.[253] In addition to his constitutionally granted title of Commander in Chief of the Armed Forces,[254] the President has further assumed a general power to conduct foreign relations — while the role of Con-

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[244] *See* PIOUS, *supra* note 243, at 47-84. *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 637 (Jackson, J., concurring). Jackson described three situations in which a president acts: pursuant to express congressional authorization, in the absence of either a congressional grant or denial of authority and directly contrary to congressional will. *Id.* at 635-38. When Congress has not acted, Jackson stated that the President relies on his own independent power. *Id.* at 637. In this gray area, Jackson continued, congressional inaction enables, indeed invites the President to act on his own authority. *Id.* Jackson then described as an example of this line of reasoning a situation in which President Lincoln suspended the writ of habeus corpus and succesfully asserted that he was performing an executive function, although the Constitution was silent on which branch had the power to act in that situation. *Id.* at 637 n.3.

[245] Prerogative powers are those federal powers claimed by the President over foreign and domestic policy matters in situations where the Constitution does not assign the powers to any branch. *See* PIOUS, *supra* note 243, at 48.

[246] *See supra* notes 97-101 and accompanying text.

[247] U.S. CONST. art. II, § 3. Section 3 states that the President "shall from time to time give to the Congress Information of the State of the Union." *Id.*

[248] *See* PIOUS, *supra* note 243, at 157-58.

[249] The Budget and Accounting Act of 1921, § 206 42 Stat. 20, 2, 31 U.S.C. § 1 (1970).

[250] *See* PIOUS, *supra* note 243, at 257-58.

[251] *Id.* at 256-57.

[252] *Id.*

[253] *See* United States v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936) (President is sole organ of nation in foreign affairs and sole representative with foreign nations).

[254] U.S. CONST. art. II, § 2. This section provides in part that "The President shall be commander in chief of the army and navy of the United States. . . ." *Id.*

gress in this area has been narrowly limited to constitutionally enumerated duties.[255] The President through his Secretary of State, is the sole organ of communication with foreign powers.[256] The President controls and classifies all secret information regarding national security obtained by military, diplomatic and intelligence agencies.[257] The President negotiates treaties with foreign powers and can make unapproved, treaty-like executive agreements.[258] Finally, the President can use the armed forces in hostilities for short periods of time without a declaration of war, under broad theories such as maintaining national security or upholding treaties.[259]

This brief description of Presidential duties illustrates that the President performs the broadest range of functions in the United States' constitutional form of government, functions with consequences affecting many individuals, both in the United States and abroad. Judges, already granted absolute immunity, do not approach in the execution of their office this same breadth and magnitude of responsibilities. Essentially, judges are the ultimate arbiters of the Constitution.[260] They do indeed rule on emotionally charged issues ranging from the constitutionality of the death penalty[261] and abortion[262] to the respective powers of the three branches of government.[263] Federal courts, however, deal only with legal issues properly before them in a case or controversy,[264] while the President's actions cover a broad spectrum of domestic and foreign policy concerns.[265] Given this wider ranging and potentially more controversial presidential authority, the *Nixon* Court was entirely correct in recognizing that the greatest public interest exists in providing the President with absolute immunity.

The Court was also correct in its reasoning that the President's unique status affords him an unmatched visibility and makes him a ready target for civil damage suits, the threat of which could lessen his effectiveness, and

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[255] *See* PIOUS, *supra* note 243, at 333. *See also* United States v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936) (President *makes* treaties with Senate advice and consent. President alone *negotiates* treaties).

[256] *See* PIOUS, *supra* note 243, at 334.

[257] *See id.* at 342-43.

[258] *Id.* at 335, 340-41. Between 1946 and 1971, for example, the United States entered 361 treaties approved by the Senate and 5,559 executive agreements. *Id.* at 340.

[259] *See id.* at 373-74. The War Powers Resolution, passed by Congress in 1974, now limits the use of United States armed forces by the President without a Congressional declaration of war to sixty days. 50 U.S.C. § 1544(b) (1974).

[260] See Marbury v. Madison, 7 U.S. (1 Cranch) 368, 371-91 (1801).

[261] *E.g.*, Godfrey v. Georgia, 446 U.S. 420, 426-33 (1980).

[262] *E.g.*, Roe v. Wade, 410 U.S. 113, 147-67 (1972).

[263] *See, e.g.*, United States v. Nixon, 418 U.S. 683, 708 (1974); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585-89 (1952).

[264] U.S. CONST art. III, § 2. *See also* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 1-111 (1978). *See also* C. & S. Air Lines v. Waterman Corp., 333 U.S. 103, 113 (1948) (Supreme Court does not give advisory opinions).

[265] *See supra* notes 243-57 and accompanying text.

thereby do harm to the nation he serves.[266] Even a small sampling of the suits for unconstitutional deprivations of rights brought against President Nixon in the years following *Bivens*[267] reveals the myriad of potential avenues of suit against the President. For example, in one case a former chemist at a Veterans Administration hospital sued Nixon individually and in his capacity as President for violations of his first amendment rights to freedom of religion, complaining that he resigned rather than face termination because of religious discrimination.[268] In another case, a private citizen sued President Nixon and five hundred other named and unnamed government officials for deprivations of constitutional rights by virtue of improper surveillance, false arrest and unauthorized search and seizure.[269] Class suits and individual taxpayer suits were brought against the President to challenge the constitutionality of and enjoin expenditures for the war in Vietnam.[270] In yet another case, a taxpayer sued the President over an emergency act granting assistance to Israel, charging that it violated the establishment clause of the first amendment.[271] Moreover, a widely syndicated columnist sued Nixon and eighteen other officials for constitutional infringements when the Watergate tapes revealed that the President may have ordered his telephones wiretapped.[272] Some of these cases were dismissed due to lack of standing[273] or failure to state a claim.[274] Other cases, however, dismissed the President as a party only because of presidential immunity.[275] One such court reasoned that the President should not be distracted in his duties, particularly where other remedies were afforded the plaintiff[276] — a point with which the *Nixon* Court agreed.[277] Significantly, had the President been protected only by qualified immunity in such cases, each would have proceeded at least through costly and time consuming discovery procedures before dismissal would have been possible.[278] In the case of a complaint like Fitzgerald's — where a full litany of administrative remedies existed and in fact relief was awarded[279] — the civil action was an un-

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[266] Nixon v. Fitzgerald, 102 S. Ct. 2690, 2703 (1982).

[267] *See supra* note 207 and accompanynig text.

[268] *See* Harris v. Nixon, 325 F. Supp. 28, 29 (D. Colo. 1971).

[269] *See* Reese v. Nixon, 347 F. Supp. 314, 315 (C.D. Cal. 1972).

[270] *See* Meyers v. Nixon, 339 F. Supp. 1388, 1389-90 (S.D.N.Y. 1972); Atlee v. Nixon, 336 F. Supp. 790, 791 (E.D. Pa. 1972).

[271] *See* Dickson v. Nixon, 379 F. Supp. 1345, 1346 (W.D. Tex. 1974).

[272] *See* Anderson v. Nixon, 444 F. Supp. 1195, 1197 (D.D.C. 1978).

[273] *See* Dickson v. Nixon, 379 F. Supp. 1345, 1348 (W.D. Tex. 1974).

[274] Harris v. Nixon, 325 F. Supp. 28, 36 (D. Colo. 1971).

[275] *See* Reese v. Nixon, 347 F. Supp. 314, 316-17 (C.D. Cal. 1972); Atlee v. Nixon, 336 F. Supp. 790, 791-92 (E.D. Pa. 1972). *See also* Meyers v. Nixon, 339 F. Supp. 1388, 1389-91 (S.D.N.Y. 1972) (not reaching issue of executive immunity, but expressing agreement with *Atlee*).

[276] Atlee v. Nixon, 336 F. Supp. 790, 792 (E.D. Pa. 1972).

[277] *See* Nixon v. Fitzgerald, 102 S. Ct. 2690, 2704 & n.37 (1982).

[278] *See supra* notes 162-63 and accompanying text.

[279] *See* Nixon v. Fitzgerald, 102 S. Ct. 2690, 2696, 2704 & nn.17 & 37. Fitzgerald refused available administrative relief prior to inititating the instant proceeding. *Id.* at 2704.

warranted intrusion on presidential authority which was properly avoided by the grant of absolute immunity.

In *Nixon*, therefore, since the President's duties are more sensitive than those of judges or prosecutors, and the public interest in uninhibited performances of those duties is greater than that present with respect to a judge's or prosecutor's duties, the Court correctly found absolute immunity for the President. The functional comparability test set forth in *Butz*,[280] applied to the President, was in actuality all the justification needed by the Court to grant the President absolute immunity from civil damage liability.

The dissenters in *Nixon* incorrectly applied the *Butz* test to the situation presented by President Nixon's role in the firing of Fitzgerald. Their inquiry would have involved looking only to see if the challenged function — the dismissal of an employee — was constitutionally assigned to the President and whether the performance of that function would be substantially impaired by allowing Fitzgerald's civil suit.[281] The dissenters concluded that the answers to both of those questions were no, and thus absolute immunity should not apply.[282] The dissenters' analysis was faulty in two respects. First, the function challenged in *Nixon* is assigned both constitutionally and statutorily to the President. The Constitution specifically makes the President the Commander in Chief of the Armed Forces and head of the Executive Branch.[283] In conjunction with federal statutory law,[284] the Constitution gives the President the authority to direct the Secretary of the Air Force in matters involving the conduct of Air Force business.[285] Second, the dissenters construed the term "functions" too narrowly. The dissenters contended that *Butz* may be read to grant absolute immunity only to those specific functions performed by any particular official for which the immunity is clearly essential.[286] *Butz*, however, cited with approval language from *Bradley* which held judges absolutely immune from civil suits for malice or corruption in their actions while exercising judicial functions within the *general* scope of their jurisdiction.[287] In *Bradley*, a judge who had been verbally maligned by an attorney struck the latter's name from the rolls of attorneys allowed to practice in the criminal court of the district.[288] Despite the nature of the judge's actions, he was granted absolute immunity.[289] Absolute immunity as granted to certain officials by the Court in prior decisions does indeed apply only to the particular functions of the official's office.[290]

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[280] Butz v. Economou, 438 U.S. 478, 508 (1978).
[281] *See* Nixon v. Fitzgerald, 102 S. Ct. 2690, 2720 (White, J., dissenting).
[282] *Id.* (White, J., dissenting).
[283] U.S. CONST. art. II, §§ 1 & 2.
[284] 10 U.S.C. § 8012(b) (1970).
[285] Nixon v. Fitzgerald, 102 S. Ct. 2690, 2705 (1982).
[286] *Id.* at 2709-10 (White, J., dissenting).
[287] Butz v. Economou, 438 U.S. 478, 509 (1978).
[288] Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 344 (1871).
[289] *Id.* at 347, 357.
[290] *Id.*

Those functions, however, include all the duties generally assigned to that official and have been broadly construed by the Court to include a wide range of matters,[291] and would certainly include the challenged action in *Nixon*. By declaring that judges have been granted absolute immunity only for judicial functions, and not for criminal liability,[292] the dissenters incorrectly implied that the *Nixon* majority found a broader application of absolute immunity for the President. Contrary to the dissenters' conclusion, the *Nixon* Court specifically limited its holdings to find absolute immunity for civil damage liability only for acts within the outer perimeter of the President's official duties.[293]

In addition, the dissenters were incorrect in their conclusion that the absolute immunity granted places the President above the law[294] and deprives Fitzgerald of an adequate remedy.[295] The decision in *Nixon* leaves the President subject to judicial process to vindicate the public interest in ongoing criminal cases and in other constitutional confrontations where the public interest demands that the separation of powers be maintained.[296] Further, all other constitutional and historical protections, such as impeachment, legislative actions, press scrutiny and the desire to be re-elected remain.[297] Fitzgerald had an administrative remedy that included reinstatement in the equivalent of his old job and reimbursement for all back pay lost.[298] Given the protections afforded the nation and the individual in this case, the public interest in allowing the President to perform his duties without the threat of civil damage liability far outweighed any individual or public need for such liability.

4. The Importance of the Separation of Powers Argument

The second ground recognized by the Court for granting absolute immunity — the separation of powers doctrine[299] — strengthened the holding, but was not an essential element. The dissenters were correct in pointing out that the Court merged the separation of power argument with the public policy argument.[300] Chief Justice Burger, in his concurrence, apparently reasoned that the existence of the separation of powers argument alone afforded the President absolute immunity and no discussion of prior immunity decisions was necessary.[301] The Court, on the other hand, used the separation of powers argument as an additional justification for absolute immunity along with the

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[291] *See* Butz v. Economou, 438 U.S. 478, 508-17 (1978).
[292] Nixon v. Fitzgerald, 102 S. Ct. 2690, 2710 (White, J., dissenting).
[293] *See id.* at 2705.
[294] *Id.* at 2711 (White, J., dissenting).
[295] *See id.* at 2719 (White, J., dissenting).
[296] *Id.* at 2704.
[297] *Id.* at 2706.
[298] *Id.* at 2696 & n.17 and 2704 & n.37.
[299] *Id.* at 2703-04.
[300] *See id.* at 2717 (White J., dissenting).
[301] *Id.* at 2706-08 (Burger, C.J., concurring).

comparability of the President's functions to those of other officials previously granted absolute immunity.[302] In so doing, the Court used the separation of powers only to add greater authority and emphasis to the holding, not to justify its conclusion. Close scrutiny of the *Butz* functional comparability test and the public interests behind absolute immunity make it clear that this immunity should have been granted — even absent the separation of powers doctrine — on a simple functional comparison of the President's responsibilities with, for example, a judge's duties.[303] The separation of powers doctrine, therefore, does nothing to make this case inconsistent with previous immunity decisions, but rather makes it the highest rung on the immunity ladder. With all of the factors required in the *Butz* functional comparability test present plus the separation of powers doctrine, *Nixon v. Fitzgerald* is both harmonious with *Butz* and the strongest possible absolute immunity protection accorded a public servant. Thus, the absolute immunity granted the President is entirely consistent with that granted other officials at common law, and is fortified by an additional constitutional mandate.

IV. THE IMPLICATIONS OF *NIXON* FOR FUTURE IMMUNITY CASES

The Supreme Court's decision in *Nixon v. Fitzgerald* will not lead to a large increase in the number of government officials granted absolute immunity in the future. First, to obtain any immunity, either qualified or absolute, an official will have to show that he acted within the outer perimeter of his duties. At that point, most officials will be granted qualified immunity only, which protects them if, in the view of the court, they had reasonable grounds at the time and in the circumstances for a good faith belief that they were acting legally and within the scope of their duties.[304] Under *Butz* as clarified by *Nixon*, only a

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[302] *Id.* at 2702-04.

[303] The use of the functional comparability test as the primary justification for absolute immunity, rather than the separation of powers argument, is particularly appropriate in *Nixon*. The *Nixon* Court states that its approach to the case will be expressly to avoid the constitutional issues that would arise if Congress had explicitly created a damages action against the President. *Id.* at 2701 n.27. Since the Court is therefore limiting its holding to granting the President absolute immunity from civil suits in implied causes of action, *id.*, the Court's use of the common law functional comparability test it has developed in prior immunity cases is all the justification it needs. However, the situation would be different if Congress should, in the future, expressly create a damage action against the President. If, for example, Congress were to enact a statute along the general lines of section 1983 but aimed at the President, providing that "no president, under color of federal law, shall deprive any person of his constitutional rights," the Court would have to decide the separation of powers argument as an independent argument, distinct from the public policy arguments for absolute immunity. The President would argue that the legislative branch does not have the power under the constitution to impinge on the executive in such a fashion; if the courts tried to enforce such a statute against him, the President might argue that the judicial branch does not have such power either. Such a statute would create a case in which the separation of powers argument would by necessity be decisive. Such is not the case, however, in *Nixon*, and the Court was therefore able to merge the separation of powers argument with the functional comparability argument and use the separation of powers argument as additional justification for granting the President absolute immunity.

[304] *See supra* note 72 and accompanying text.

few key officials will have absolute immunity based on the functional comparability of their duties to those other officials granted absolute immunity in the public interest, like judges, prosecutors and the President.[305] The Court has already served notice that it will grant this absolute immunity sparingly. In a companion case to *Nixon*, *Harlow v. Fitzgerald*[306] the Court considered whether President Nixon's top aides would be granted absolute immunity for the very same constitutional violations the President was alleged to have committed in *Nixon v. Fitzgerald*.[307] The Court held that presidential aides do not perform a sufficiently sensitive function to make it in the public interest to grant them absolute immunity.[308] Rather, the Court found that, as in the case of a cabinet official in *Butz*,[309] the public policy interests were outweighed by the importance of preserving the constitutional rights of the individual, and only qualified immunity would apply.[310]

When the holding in *Harlow* is considered together with the Court's decision in *Nixon v. Fitzgerald* it is apparent that their effect is to reaffirm the holding in *Butz* that most government officials will have only qualified immunity. Indeed it is difficult to envision the Court, having rejected absolute immunity for cabinet officers in *Butz*, presidential aides in *Harlow* and state governors in *Scheuer*, granting such immunity to government officials other than the President, judges and prosecutors. Members of Congress need not be considered by the Court since they are expressly granted absolute immunity for their official acts by the Constitution.[311] The Vice-President of the United States, however, would have difficulty showing that the public interest demanded absolute immunity for his office under the stringent application of the functional comparability test in *Butz* and *Harlow*. Moreover, the duties of government officials other than the President probably are not sufficiently sensitive to warrant absolute immunity. In conclusion, *Nixon v. Fitzgerald* represents a narrow application of the *Butz* functional comparability test to the unique office of the Presidency resulting in the granting of absolute immunity to the President, but not signaling a large increase in the number of officials protected by absolute immunity in the future.

CONCLUSION

Nixon v. Fitzgerald was a case of first impression, wherein the United States Supreme Court considered whether the President was absolutely immune from civil damage liability for constitutional violations. The Constitution is silent on

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[305] *See* Nixon v. Fitzgerald, 102 S. Ct. 2690, 2704 (1982); Butz v. Economou, 438 U.S. 478, 506 (1978).

[306] 102 S. Ct. 2727 (1982).

[307] *Id.* at 2730.

[308] *Id.* at 2736.

[309] Butz v. Economou, 438 U.S. 478, 481 (1978).

[310] Harlow v. Fitzgerald, 102 S. Ct. 2727, 2736 (1982).

[311] *See* U.S. CONST. art. I, § 6.

the precise issue. Prior to 1971, few people had sued the President for civil damages. In 1971, when the Court created a civil damage remedy against federal officials in *Bivens v. Six Unknown Federal Agents*, the possibility of suits against the President loomed larger. Moreover, the Court in *Butz v. Economou* held that most federal officials have only qualified immunity, but that where public interest demanded it, certain officials would be given absolute immunity from civil damages predicated on official acts.

In *Nixon*, the Court concluded that absolute immunity was a functionally mandated incident of the President's unique constitutional status and the separation of powers doctrine. The Court determined that absolute immunity was supported by both constitutional history and public policy. The President's duties, the Court reasoned, were broad in scope and had widespread impact on the public, like those of judges and prosecutors — officials previously granted absolute immunity by the Court. In addition, the Court emphasized that the President holds a unique position in the United States' constitutional structure, a fact adding to the necessity of a finding of absolute presidential immunity.

In concluding that the President has absolute immunity from civil damage liability for deprivations of constitutional rights, the *Nixon* Court followed precisely the analysis suggested in *Butz* to distinguish those officials whose functions require absolute immunity from those who generally have qualified immunity. The *Nixon* Court looked first to the threshold question of whether any immunity existed, and then considered the type of immunity appropriate for the President. In light of this analysis, *Nixon v. Fitzgerald* is in harmony with prior immunity decisions of the Supreme Court. The Court noted, however, that the separation of powers doctrine provides further support for granting absolute immunity. Presidential immunity therefore is the most strongly supported immunity possible in our constitutional structure.

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