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Presidential Immunity from Civil Liability Nixon v. Fitzgerald

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RECENT DEVELOPMENT

PRESIDENTIAL IMMUNITY FROM CIVIL LIABILITY

Nixon v. Fitzgerald

One of the most highly valued principles of democratic government is that no man is above the law.[1] As Justice Marshall proclaimed in *Marbury v. Madison*,[2] "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[3] Through the defense of immunity, however, the courts have carved an exception to this basic principle. In *Nixon v. Fitzgerald*,[4] the Supreme Court applied the exception to hold that a President may not be held civilly liable for any actions taken within the scope of his office. This Note argues that this grant of absolute immunity was overly broad, and that the Court should have granted the President qualified immunity, reserving absolute immunity only for certain highly sensitive functions.[5]

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1 *See* United States v. Lee, 106 U.S. 196, 220 (1882):

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

2 5 U.S. (1 Cranch) 137 (1803).

3 *Id.* at 163; *see also* Complete Auto Transit, Inc. v. Reis, 451 U.S. 401, 429 (1981) (Burger, C.J., dissenting) ("Accountability of each individual for individual conduct lies at the core of all law—indeed, of all organized societies."); *cf.* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 390-98 (1971) (creating an implied right to sue federal officials for civil damages arising from constitutional violations).

4 102 S. Ct. 2690 (1982).

5 This Note will deal exclusively with presidential immunity from *constitutional* violations for three reasons. First, of all possible infractions, constitutional violations are the most significant. Second, many of the Supreme Court cases consider immunity under the rubric of 42 U.S.C. § 1983 (Supp. IV 1980), which deals entirely with constitutional violations. Third, the Court in Butz v. Economou, 438 U.S. 478 (1978), distinguished common law torts from constitutional claims and held that violation of the former by a cabinet member does not abrogate absolute immunity. *See infra* note 44. The Court, in offering this distinction, did not clearly specify into which category statutory violations would fall. Justice White, in distinguishing the cases of common law torts, wrote for the majority in *Butz v. Economou* that "[i]t is apparent also that a quite different question would have been presented had the officer ignored an express statutory or constitutional limitation on his authority." 438 U.S. at 489. Although the langnage of the majority in *Butz* seems to indicate that statutory violations and constitutional infractions would obviate absolute immunity, the ambiguity still exists.

I
THE CONCEPT OF IMMUNITY

A. Absolute Immunity

Officials entitled to absolute immunity[6] need not defend on the merits of a complaint; the court will dismiss the case early in the proceedings.[7] To be eligible for absolute immunity, the defendant must demonstrate that his contested behavior fell within the scope of his official duties.[8] The applicable test, as enunciated by the Supreme Court in *Spalding v. Vilas*,[9] is very broad: any "action having more or less connection"[10] with the executive's office is within the scope of his authority. Only activities that are "manifestly or palpably beyond" his duties fall outside the standard.[11] In the words of Justice Rehnquist, the test ensures protection for the officer who has not "wandered completely off the official reservation."[12]

A second frequently cited criterion for absolute immunity requires that the defendant's challenged activity be "discretionary" as opposed to "ministerial."[13] The conduct must not be perfunctory or involve insignificant decisions based on office routine rather than personal judg-

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6 For a comprehensive history of the immunity defense, see Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1119-1133 (1981); Note, *Qualified Immunity for Executive Officials for Constitutional Violations:* Butz v. Economou, 20 B.C.L. REV. 575 (1979) [hereinafter cited as *Qualified Immunity*]. For a discussion of presidential immunity, see Note, *Presidential Immunity from Constitutional Damage Liability,* 60 B.U.L. REV. 879 (1980) (advocating absolute immunity for the President) [hereinafter cited as *Presidential Immunity*]; *The Supreme Court, 1981 Term—Immunity of the President and Other Government Officials*, 96 HARV. L. REV. 226-36 (1982) (discussion of *Nixon v. Fitzgerald* and *Harlow v. Fitzgerald*) [hereinafter cited as *Immunity*]; Note, Halperin v. Kissinger: *The D.C. Circuit Rejects Presidential Immunity from Damage Actions*, 26 LOY. L. REV. 144 (1980) (rejecting absolute immunity for the President).

7 *See* Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976) ("An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity."); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 970 (4th ed. 1971) ("An immunity . . . does not deny the tort, but the resulting liability.").

8 *See, e.g.*, Barr v. Matteo, 360 U.S. 564, 574-75 (1959) (official acted within "line of duty" in making statements about plaintiffs in press release); Spalding v. Vilas, 161 U.S. 483, 498 (1896) (head of executive department "cannot be held liable to a civil suit for damages on account of official communications made by him pursuant to an act of Congress, and in respect of matters within his authority"); *cf.* United States v. Brewster, 408 U.S. 501, 526 (1972) (congressman accused of accepting bribe does not receive immunity, because alleged activity is not within scope of legislator's office).

9 161 U.S. 483 (1896); *see supra* note 8.

10 161 U.S. at 498.

11 *Id.*

12 Butz v. Economou, 438 U.S. 478, 519 (1978) (Rehnquist, J., dissenting).

13 Barr v. Matteo, 360 U.S. 564, 574 (1959); Spalding v. Vilas, 161 U.S. 483, 488-99 (1896). The Supreme Court in Scheuer v. Rhodes, 416 U.S. 232, 247 (1974), articulated the policy reason for affording more latitude to high-level officials: "In short, since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad."

ment.[14] This distinction is not especially important in the case of the President, however, because by the nature of his office, few decisions are ministerial.

Courts and commentators have justified the use of absolute immunity on two grounds. First, they argue that it would be too harsh if a well-intentioned official who must make difficult "discretionary" decisions were subject to costly and annoying suits merely for performing his job.[15] A second and more compelling argument raises the fear that the threat of civil liability would deter officials from making controversial decisions.[16] In confronting the delicate balance between the rights of aggrieved plaintiffs and the need of officials to make unfettered decisions, the courts historically have favored absolute immunity.[17] As Judge Learned Hand explained: "[I]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."[18]

Applying this reasoning, courts have granted judges,[19] prosecu-

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14 For an explanation of the "discretionary" requirement, see Hyman, *Qualified Immunity Reconsidered*, 27 WAYNE L. REV. 1409 (1981); Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 223 (1963); Note, *Constitutional Law—Federal Executive Officials Sued for Alleged Violations of Constitutional Rights Entitled Only to a Qualified Immunity*, 53 TUL. L. REV. 955 (1978).

15 *See* Jaffe, *supra* note 14, at 223. This rationale, however, does not carry much weight because "it has become obvious that any injustice to the officer can easily be taken care of by indemnity or assumption of direct liability by the state." *See id.*

16 *See* Imbler v. Pachtman, 424 U.S. 409, 424 (1976) (absolute immunity for prosecutor assures vigorous and fearless performance). *Imbler* quoted Pearson v. Reed, 6 Cal. App. 2d 277, 287, 44 P.2d 592, 597 (1935):

> The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded and we would have moved away from the desired objective of stricter and fairer law enforcement.

424 U.S. at 424.

17 The Court, in granting absolute immunity to a governmental official in Barr v. Matteo, 360 U.S. 564 (1959), explained the dilemma:

> [W]e are called upon in this case to weigh in a particular context two considerations of high importance which now and again come into sharp conflict—on the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities.

Id. at 564-65; *see also* Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950) (absolute immunity for government officers because burden of trial and danger of its outcome would dampen ardor of most officials in performing their duties).

18 Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

19 *E.g.*, Stump v. Sparkman, 435 U.S. 349, 355-56 (1978); Pierson v. Ray, 386 U.S. 547, 553-54 (1967); *see also* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 354 (1871).

tors,[20] and legislators[21] absolute immunity from civil liability for all activities within the scope of their official functions. The question of federal executive immunity, however, is considerably more complicated because of the Court's apparent retreat from its earlier holdings[22] that federal executive officials are absolutely immune from civil liability.[23] In the early case of *Spalding v. Vilas*,[24] the Supreme Court applied the "same general considerations of public policy and convenience" that mandated immunity for judges to "heads of Executive Departments."[25] Thus, even though the plaintiff alleged malice, the Court held the Postmaster General absolutely immune from a charge of libel.[26] Justice Harlan expressed the Court's concern that subjecting an executive official to civil suit "would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government . . . ."[27] Similarly, in *Barr v. Matteo*[28] the Supreme Court applied the *Spalding* doctrine to afford a sub-cabinet-level official absolute immunity from charges of libel and defamation stemming from a press release in which he announced his intention to suspend employees mistakenly accused of committing actions condemned by Congress.[29] In more recent cases, however, the Court has indicated a willingness to limit executive officials' immunity from civil liability for certain actions.[30]

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20 *E.g.,* Imbler v. Pachtman, 424 U.S. 409, 427 (1976); Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950); Yaselli v. Goff, 12 F.2d 396, 406 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927).

21 The speech or debate clause of the United States Constitution grants congressmen and their aides immunity for acts related to their legislative function. U.S. CONST. art. I, § 6; *see* Gravel v. United States, 408 U.S. 606, 613-22 (1972) (United States Senator immune from criminal prosecution for reading the "Pentagon Papers" into the Congressional Record during special session of Senate subcommittee).

In Tenny v. Brandhove, 341 U.S. 367 (1951), the Court granted absolute immunity to state legislators as well. *Tenny* also presented the Court with its first opportunity to consider the question of official immunity to suits brought under what is now 42 U.S.C. § 1983 (Supp. IV 1980). *See infra* note 32.

22 *See infra* notes 24-29 and accompanying text.

23 The Court in Butz v. Economou, 438 U.S. 478 (1978), distinguished the early cases that granted federal executive officials absolute immunity from later cases that conferred only qualified immunity on the ground that the former involved common law tort claims while the latter dealt with constitutional allegations. *See id.* at 492-96. This argument is particularly unconvincing because implied-damage actions grounded in constitutional rights only became available after Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). *See infra* notes 39, 44.

24 161 U.S. 483 (1896).

25 *Id.* at 498.

26 *See id.* at 499.

27 *See id.* at 498.

28 360 U.S. 564 (1959).

29 *See id.* at 570-74.

30 *See infra* notes 31-50.

B. Qualified Immunity

The Supreme Court first applied the qualified immunity test in 1973 in *Scheuer v. Rhodes*.[31] The case involved a section 1983[32] suit against Governor Rhodes of Ohio for his alleged responsibility in the killing of four students by national guardsmen during an anti-war demonstration at Kent State University.[33] Rejecting the governor's defense of absolute immunity in section 1983 actions,[34] the Court held that an officer is immune from civil suit if at the time of action he possessed a good-faith belief that his actions were lawful.[35]

The *Scheuer* test frustrated both the defendants, whose motives and thought processes were opened to discovery, and the plaintiffs, who confronted the difficult task of demonstrating bad faith.[36] The Court modified the qualified-immunity test a year later in another section 1983 case, *Wood v. Strickland*,[37] by adding an objective element. The Court held that not only would it deny immunity if the official knew he was violating the plaintiff's constitutional rights, but it also would deny immunity if the official reasonably should have known that his act constituted such a violation.[38] The objective part of the test enabled plaintiffs to sue negligent as well as malicious officials.

Butz v. Economou[39] involved a federal executive faced with a constitutional tort claim. Although it was not a section 1983 case,[40] it

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31 416 U.S. 232 (1974).

32 42 U.S.C. § 1983 (Supp. IV 1980) reads in part:

> Every person who, under color of any statute, ordinanee, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the Unitcd States or other person within the jurisdiction thercof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

33 *See* 416 U.S. at 234.

34 *See id.* at 243. For a discussion of immunity from § 1983 suits, see Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482 (1982).

35 [a] *qualified* immunity [of varying scope] is available to officers of the executive branch of govcrnment, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the aetion on which liability is sought to be based.

416 U.S. at 247 (emphasis added).

36 *See infra* notes 46-49 and accompanying text.

37 420 U.S. 308 (1975) (suspended students charged school board members, under § 1983, with violating their fifth amendment and due process rights).

38 *See id.* at 321. The Court noted that an offieial "must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges." *Id.* at 322.

39 438 U.S 478 (1978).

40 *Butz* was a "*Bivens*-type" action. In Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), the plaintiff alleged that the defendants, acting under their authority as federal narcoties agents, violated his fourth amendment rights by conducting a warrantless search of his apartment. The Court held that Bivens was entitled to damages. *See id.* at 395-97. A similar right under § 1983 had existed for some time to redress damages arising from constitu-

presented the Court with an opportunity to reexamine the absolute immunity granted high-ranking officers in *Spalding v. Vilas*[41] and *Barr v. Matteo*,[42] in light of the later section 1983 decisions. In *Butz*, Economou sued the Secretary of Agriculture for constitutional and statutory violations. The five-to-four majority opinion, written by Justice White, held that although Butz was absolutely immune from all suits alleging common law tort claims, he was only entitled to qualified immunity for the constitutional charges.[43] Justice White cited the reasoning of the section 1983 cases and proclaimed that "[t]o create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head."[44] The majority provided, however, that certain "special functions" of an executive officer, such as his adjudicatory or prosecutorial roles, could be afforded absolute immunity from civil liability.[45]

The Court once again modified the qualified immunity standard in *Harlow v. Fitzgerald*.[46] In *Harlow*, the Court held that Bryce Harlow and

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tional violations committed under the color of state law. *See supra* note 32. The Court's decision in *Bivens* to allow damages for constitutional violations by *federal* officers thereby removed an illogical discrepancy. *See infra* note 44.

41 161 U.S. 483 (1896); *see supra* notes 24-27 and accompanying text.

42 360 U.S. 564 (1959); *see supra* notes 28-29 and accompanying text.

43 *See* 360 U.S. at 507.

44 438 U.S. at 504. Justice White also noted that strong reasons support equalizing the § 1983 and *Bivens* remedies. Both types of action originate from the Constitution and, from both practical and policy standpoints, "*federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do *state* officers." *Id.* at 501 (emphasis in original).

Justice Rehnquist vigorously dissented, condemning what he considered to be the arbitrary distinction drawn by the majority between common law torts and constitutional violations. He faulted the majority for indulging a strained reading of prior eases and for insensitivity to the plight of the vulnerable official. In particular, he outlined two differences that he perceived between § 1983 and *Bivens* actions. First, *Bivens* actions are generally not directed against high-ranking executive officials, for whom absolute immunity is desirable, but rather against officials who historically have received only qualified immunity. Therefore, absolute immunity for executive officials would not eviscerate a *Bivens* action. *See id.* at 524. Second, Congress expressly waived sovereign immunity for *Bivens* actions, but did not do so for § 1983 suits. This waiver permits suits against the federal government rather than against the offending official. In addition, "the Federal Government can internally supervise and check its own officers. The Federal Government is not so situated that it can control state officials or strike this same balance, however. Hence the necessity of § 1983 and the differing standards of immunity." *Id.* at 525 (Rehnquist, J., dissenting). Justice Rehnquist's argument, of course, is less compelling when no congressional waiver of sovereigu immunity exists.

45 *See id.* at 508-09.

> Although a qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations, our decisions recognize that there are some officials whose special functions require a full exemption from liability. In each case, we have undertaken "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it."

Id. at 508 (citations omitted).

46 102 S. Ct. 2727 (1982). *See infra* note 52.

In *Harlow*, the companion case to *Nixon v. Fitzgerald*, the Court held that "[t]he considera-

Alexander Butterfield, two of President Nixon's top aides, were entitled only to qualified immunity from Fitzgerald's allegations of constitutional violations.[47] Concluding, however, that "[j]udicial inquiry into subjective motivation . . . [was] peculiarly disruptive of effective government,"[48] the Court eliminated the subjective element from the qualified-immunity test.[49] Without the difficult factual issues involved in determining malice, this reformed test provided an easier standard for dismissing insubstantial claims through summary judgment.[50]

II

NIXON V. FITZGERALD

Fitzgerald sued President Nixon and two of his top aides, Bryce Harlow and Alexander Butterfield, for civil damages in federal court.[51] Fitzgerald claimed that he was discharged from the Department of the Air Force in retaliation for "whistle-blowing" testimony before a congressional committee[52] and that his firing constituted a conspiracy to

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tions that supported our decision in *Butz* [granting qualified immunity to a cabinet member] apply with equal force to this case. It is no disparagement of the offices held by petitioners to hold that Presidential aides, like members of the Cabinet, generally are entitled only to a qualified immunity." 102 S. Ct. at 2734. Chief Justice Burger, the sole dissenter, argued that the Court should have granted the aides absolute immunity on the theory of derivative immunity. In Gravel v. United States, 408 U.S. 606, 613-22 (1972), the Court had held that congressional aides were entitled to the same immunity as legislators whenever the aides were performing legislative functions acting, in effect, as the congressman's "alter ego." Similarly, Chief Justice Burger contended, "[t]he function of senior Presidential aides, as the 'alter egos' of the President, is an integral, inseparable part of the function of the President." 102 S. Ct. at 2744 (Burger, C. J., dissenting) (footnote omitted).

47 *See* 102 S. Ct. at 2734.

48 *Id.* at 2738.

49 *See id.* at 2737-38.

50 *See id.* at 2739.

51 Fitzgerald v. Butterfield, No. 74-178 (D.D.C. filed March 26, 1980). The suit originally did not include former President Nixon. Nixon was added as a defendant in an amended complaint. Nixon v. Fitzgerald, 102 S. Ct. 2690, 2707 (1982).

52 Fitzgerald was employed as a management analyst by the Department of the Air Force. In 1968, after Nixon was elected President, but before he took office, Fitzgerald testified before Senator Proxmire's joint congressional subcommittee about a potential $2 billion cost overrun in the development of the C-5A transport plane. After his testimony, Fitzgerald's relationship with his superiors and coworkers in the Department of the Air Force deteriorated. In November of 1969 Fitzgerald's job was eliminated in a "reorganization" that he alleged was merely a camouflage for his retaliatory discharge.

Fitzgerald initiated an administrative proceeding before the Civil Service Commission. At the hearing, Secretary of the Air Force Seamans denied that Fitzgerald was fired in retaliation for his congressional testimony and "declined to be more specific" as to any White House involvement. Shortly thereafter, President Nixon announced that he had personally ordered the termination:

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

violate his statutory[53] and first amendment[54] rights. In a five-to-four decision, the Court held that Nixon was absolutely immune from civil liability for all actions taken within the scope of his office.[55] Justice Powell, writing for the plurality,[56] supported the grant of absolute immunity through an analysis of history, the constitutional doctrine of separation of powers, and public policy.[57] The separation-of-powers argument also formed the core of Chief Justice Burger's concurring opinion.[58]

The historical analysis appeared in a lengthy footnote,[59] in which the plurality argued that the framers of the Constitution never envisioned liability for civil damages resulting from actions taken by a President within the scope of his office. Justice Powell contended that the

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The next day, the President retracted his statement, alleging that he had confused Fitzgerald with someone else. 102 S. Ct. at 2695.

The Commission rejected Fitzgerald's claim of retaliatory termination, but did find that his discharge was motivated by "reasons purely personal to [Fitzgerald]." Fitzgerald then filed suit in federal court against Defense Department Officials, White House aides, and later the President himself. The court of appeals held that because Fitzgerald had no way of knowing of the White House's possible involvement until 1973, the statute of limitations had not run. *Id.* at 2696. In addition, the district court denied Nixon's motion for summary judgment, ruling that he was not entitled to absolute immunity. Nixon took a collateral appeal of the immunity decision to the court of appeals, which dismissed summarily. *Id.* at 2697. The Supreme Court granted certiorari. 452 U.S. 959 (1981).

53 The district court held that Fitzgerald had stated implied causes of action under 5 U.S.C. § 7211 (1976 & Supp. II 1978) (employees' right to petition Congress) and 18 U.S.C. §1505 (1976) (obstruction of proceedings before departments, agencies and congressional committees). Brief for Petitioner at 1A-2A, Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982).

54 The district court held Fitzgerald had stated a *Bivens* implied cause of action under the first amendment by alleging that Nixon retaliated against him for exercising his right of free speech and petition. *Fitzgerald v. Butterfield*, No. 74-178 at 1 (D.D.C March 26, 1980).

55 *See* 102 S. Ct. at 2705.

56 Justices O'Connor, Stevens, and Rehnquist joined Justice Powell's opinion. Classification of the opinion is problematic. Because Chief Justice Burger did not formally join it, Justice Powell's opinion is technically a plurality opinion. It is important to note, however, that Chief Justice Burger concurred fully in Justice Powell's grant of absolute immunity to former President Nixon. Chief Justice Burger believed, however, that this result could have been achieved on constitutional grounds alone. *See infra* note 63 and accompanying text. In his dissent, however, Justice White refers to Justice Powell's opinion and Chief Justice Burger's concurrence as "the Court." *Id.* at 2709 (White, J., dissenting). One commentator took a conservative tack, referring to "the Powell opinion." *See Immunity*, *supra* note 6. Because the policy argument forms the core of Justice Powell's analysis, and hence distinguishes his opinion from the Chief Justice's concurrence, this Note refers to Justice Powell's opinion as a plurality opinion.

57 *See* 102 S. Ct. at 2701. Although Justice Powell indicated that he grounded his opinion on three separate foundations, *see id.*, the various arguments that he employed are not easily distinguished. In particular, his "uniqueness" argument represents a meld of both his policy and constitutional claims. *See infra* notes 70-76 and accompanying text. The plurality used the unique constitutional position of the President to argue that subjecting him to civil suit was undesirable from a policy standpoint. The separation-of-powers claim is Justice Powell's only pure constitutional argument.

58 *See* 102 S. Ct. at 2706 (Burger, C.J., concurring).

59 *See id.* at 2702 n.31.

existence of impeachment as a remedy, and the absence of such suits in the past, testified to an implicit historical understanding that the President was absolutely immune.[60] In addition the plurality, and to a greater extent the dissent, invoked various authorities such as discussions at constitutional conventions, Senate debates, and the Federalist Papers to support their historical arguments.[61]

The plurality grounded its second justification for granting the President absolute immunity in the separation-of-powers doctrine.[62] Chief Justice Burger, who rested his justification of absolute immunity solely on the separation-of-powers argument,[63] warned in his concurrence that "the judiciary always must be hesitant to probe into the elements of presidential decision-making . . . . Such judicial intervention is not to be tolerated absent imperative constitutional necessity."[64] Justice Powell conceded in a footnote, however, that the plurality's holding did not necessarily bar Congress from legislating presidential liability. Nonetheless, because Congress had expressed no such intent, the plurality refused to intrude upon the presidential office.[65]

Justice Powell also revived the policy argument contained in some of the older absolute-immunity cases[66] pondering the dangers posed by "diversion of [the President's] energies by concern with private law suits . . . ."[67] The plurality noted that unlike the executive officials who received only qualified immunity in *Scheuer*[68] and *Butz*,[69] "[t]he President

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60 The plurality acknowledged, however, that the historical analysis was limited to "our constitutional heritage and structure" and could not include a review of the common law because "the Presidency did not exist through most of the development of common law." *Id.* at 2701. In fact, as the plurality noted, "a right to sue federal officials . . . was not even recognized until *Bivens*." *Id.* at 2703 n.33 (citations omitted).

61 *See id.* at 2702 n.31.

62 *See id.* at 2701.

63 In his concurring opinion, Chief Justice Burger found the plurality's policy arguments unnecessary and claimed that the separation-of-powers argument alone justified the Court's decision. *See id.* at 2706 (Burger, C.J., coneurring).

64 *Id.* at 2708 (citation omitted) (Burger, C.J., concurring). Both Chief Justice Burger and the plurality distinguished between subjecting a President to criminal charges and holding a President liable for civil damages. The plurality noted that "[t]he Court has recognized before that there is a lesser public interest in actions for civil damages than . . . in criminal prosecutions." *Id.* at 2704 n. 37.

65 *See id.* at 2701 n.27. Justice Powell contended:

> In the present case we . . . are presented only with "implied" causes of action, and we need not address directly the immunity question as it would arise if Congress expressly had created a damages action against the President of the United States. This approach accords with this Court's settled policy of avoiding unnecessary decision of constitutional issues.

Id.

66 *See supra* notes 17-20 and accompanying text.

67 102 S. Ct. at 2703.

68 416 U.S. 232 (1974); *see supra* notes 31-36 and accompanying text.

69 438 U.S. 478 (1978); *see supra* notes 40-45 and accompanying text.

occupies a unique position in the constitutional scheme."[70] The fear that civil suits would deter an official was more "compelling"[71] in the context of the Presidency, "where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system."[72] Thus, denying the President absolute immunity would pose "unique risks to the effective functioning of government."[73] In addition, the plurality considered the "sheer prominence" of the President's office.[74] Not only must the President decide questions likely to "arouse the most intense feelings,"[75] but, in addition, he "would be an easily identifiable target for suits for civil damages."[76]

In reaching its decision to grant absolute immunity, the plurality rejected the functional analysis followed in *Butz*, averring that traditionally, the Court has "refused to draw functional lines finer than history and reason would support."[77] Justice Powell argued that applying a functional analysis would be unwieldy if not impossible because the President has discretionary responsibilities in so many areas: "In many cases it would be difficult to determine which of the President's innumerable 'functions' encompassed a particular action."[78] The plurality also contended that the potential inquiries into the President's motives and thought processes would be "highly intrusive."[79] The plurality concluded its opinion with a reassurance that "absolute immunity for the President will not leave the Nation without sufficient protection against misconduct . . . ."[80] Other checks on presidential behavior remained, including impeachment, scrutiny by the press, a President's concern for his "historical stature" and his desire for re-election.[81]

Justice White, in a vehement dissent, contended that although the President deserved some degree of immunity, the demands of his office did not justify the grant of absolute immunity and the total abandonment of the functional approach.[82] He claimed that "immunity at-

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70 102 S. Ct. at 2702.

71 *Id.* at 2703.

72 *Id.* (footnote omitted).

73 *Id.*

74 *Id.*

75 *Id.* (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967)). In this respect, the plurality stated that the President is similar to judges and prosecutors to whom absolute immunity is granted. 102 S. Ct. at 2703.

76 102 S. Ct. at 2703 (citation omitted).

77 *Id.* at 2705 (citations omitted). Justice Powell did not elaborate upon this pronouncement. He merely stated that due to "the special nature of the President's constitutional office and functions," absolute immunity for the President for acts "within the 'outer perimeter' of his official responsibility" was appropriate. *Id.*

78 *Id.*

79 *Id.*

80 *Id.* at 2705-06; *see* Note, *Presidential Immunity*, *supra* note 6, at 908-09.

81 102 S. Ct. at 2705-06.

82 *Id.* at 2709 (White, J., dissenting).

taches to particular functions—not to particular offices."[83] Justice White argued that the rejection of functional immunity and adoption of a blind, absolute standard "clothes the office of the President with sovereign immunity, placing it beyond the law."[84] Moreover, the grant of absolute immunity denied an individual the "availability of the courts to vindicate constitutional and statutory wrongs . . . [an avenue that is] one of the virtues of our system of delegated and limited powers."[85]

Justice White also attacked the plurality's reasoning rejecting their historical analysis as misleading and insubstantial.[86] He argued that the absence of any executive analogue to the speech or debate clause testified to the founding fathers' unwillingness to allow presidential immunity.[87] He also rejected Justice Powell's separation-of-powers argument, contending that it proved too much: if the judicial process was too intrusive to allow civil damage remedies, then the President should not be subjected to *any* interference by the judiciary.[88] Finally, Justice White argued that the plurality's concession that its opinion did not preclude Congress from enacting legislation to abolish the President's absolute immunity undermined the force of the separation-of-powers argument.[89]

III
ANALYSIS[90]

A. The Unique Role of the President

Before *Nixon v. Fitzgerald*, the Court appeared to be less willing to

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83 *Id.* at 2709 (White, J., dissenting).

84 *Id.* at 2711 (White, J., dissenting) (footnote omitted).

85 *Id.* at 2726 (White, J., dissenting).

86 *See id.* at 2712 n.3 (White, J., dissenting) ("Although the majority opinion initially claims that its conclusion is based substantially on 'our history,' historical analysis in fact plays virtually no part in the analysis that follows.").

87 *See id.* at 2712-17 (White, J., dissenting). Neither the majority nor the dissent provided particularly compelling evidence for their historical assertions. The plurality relied heavily on Justice Story's view that the President must have absolute immunity to exercise properly his powers. *See id.* at 2701-02. The dissent argued that Story's views, coming thirty years after the constitutional convention, could not have much historical weight. *See id.* at 2715-16.

88 *See id.* at 2717-18 (White, J., dissenting) ("If there is a separation of powers problem here, it must be found in the nature of the *remedy* and not in the *process* involved.") (emphasis in original).

89 *See id.* at 2719 n.27, 2723-24 (White, J., dissenting); *see also infra* note 110 and accompanying text.

90 It is important at the outset of this analysis to distinguish the merits of absolute presidential immunity in general from application of immunity to a particular President. Although the facts of the claim in *Nixon v. Fitzgerald* may serve as an example of the equities and various competing interests involved, the question is larger than the activities of a single President. As Justice Jackson once remarked:

> The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is

grant officials absolute immunity, than it had in *Spalding v. Vilas*[91] and *Barr v. Matteo*.[92] In addition, the Court seemed willing to apply its functional analysis to all federal executives, even to the President. Indeed, some commentators interpreted *Butz v. Economou*[93] as a graceful attempt by the Court to extract itself from its extension of absolute immunity to federal executive officers.[94] This interpretation seemed particularly persuasive in light of the Court's decision to grant qualified immunity to governors in *Scheuer v. Rhodes*.[95] Moreover, *Harlow v. Fitzgerald*'s[96] elimination of the subjective element in the qualified-immunity test indicated that the Court was still attempting to balance an official's need for security with an individual's right to remedy.[97]

Neither the plurality's nor Chief Justice Burger's opinion in *Nixon v. Fitzgerald* adequately addressed the factors that justify different standards of immunity for governors and Presidents.[98] Justice Powell merely argued that the President's "unique" office entails more responsibility and a greater degree of discretion.[99] Despite the arguable validity of this distinction, absolute immunity does not logically follow, for the President's role in domestic affairs still mirrors, to a large extent, that of a governor. Certainly in *Nixon v. Fitzgerald*, which involved a personnel dispute, the "uniqueness" distinction rings hollow. Although the Presi-

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> invoked to promote, [and] of confounding the permanent executive office with its temporary occupant. The tendency is strong to emphasize transient results upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our Republic.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

Nixon was perhaps the worst possible emissary of the position that he espoused in *Nixon v. Fitzgerald*. Given his activities that ultimately led to his resignation, an extra check on his behavior was probably needed. Certainly he was not deterred by the traditional checks of the press or Congress. Indeed, transcripts from Nixon's tapes reveal the President's disdain for Congress. For example, when Secretary of the Navy Seamans was to testify before Congress on the Fitzgerald affair, Nixon instructed his staff to "have the most godawful gobbledygook answer prepared. Just put it out on executive privilege. Something that will allow us to do everything we want." Brief for Respondent at 10, Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982). Because the Court in *Nixon v. Fitzgerald* announced a doctrine that will stand for all Presidents, however, one must examine the decision broadly in terms of constitutional theory, former cases, and public policy, with an eye toward its effect on the functioning of future Presidents.

91 161 U.S. 483 (1896); *see supra* notes 15-27 and accompanying text.

92 360 U.S. 564 (1959); *see supra* note 28 and accompanying text.

93 438 U.S. 478 (1978); *see supra* notes 40-45 and accompanying text.

94 *See, e.g.*, Note, *Qualified Immunity*, *supra* note 6, at 590.

95 416 U.S. 232 (1974); *see supra* notes 31-38 and accompanying text.

96 102 S. Ct. 2727 (1982); *see supra* notes 46-50 and accompanying text.

97 As the Chief Justice explained: "Constitutional adjudication often bears unpalatable fruit. But the needs of a system of government sometimes must outweigh the right of individuals to collect damages." Nixon v. Fitzgerald, 102 S. Ct. at 2706 (Burger, C.J., concurring).

98 *But see* Note, *Presidential Immunity*, *supra* note 6, at 894-95 (different treatment of governor and President justified by differing constitutional principles that govern their relationships with the federal courts).

99 *See* 102 S. Ct. at 2702-03.

dent engages in certain functions that deserve more protection, the functional approach is capable of adjusting for any significant discrepancy. For instance, when the President directs sensitive issues of national security, the functional approach allows for the absolute immunity that the President requires in this area.[100] Justice Powell's emphasis on the special nature of the President's role seemed more a pronouncement of his conclusion than a true basis for different treatment.[101]

In considering the analogy of cabinet members, the decision in *Nixon v. Fitzgerald* seems equally misgnided and even more unfair.[102] Presidential aides Bryce Harlow and Alexander Butterfield received only qualified immunity for the very same activity in which Nixon allegedly engaged.[103] Certain highly placed aides and cabinet members regnlarly confront difficult, discretionary decisions similar to those that the President himself faces.[104] Although these officials are not subject to impeachment, they also have external checks on their behavior; aides and cabinet members, like the President, are still mindful of Congress, the press, and their political fortunes. Nevertheless, aside from reiterating its claim of presidential "uniqueness," the plurality did not explain the different treatment. In *Harlow,* the Court declared that qualified immunity represents the "best attainable accommodation of competing values."[105] In light of this strong endorsement, the Court in *Nixon v. Fitzgerald* should have presented a more comprehensive explanation of why the policy considerations differ for the President.

B. Separation of Powers

The dissent overreacted in claiming that the plurality's separation-of-powers position would exempt the President from the rule of law en-

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100 *See infra* notes 129-133 and accompanying text.

101 Justice White criticized the plurality and the concurrence:

> First, the majority informs us that the President occupies a "unique position in the constitutional scheme," including responsibilities for the administration of justice, foreign affairs, and management of the Executive Branch. True as this may be, it says nothing about why a "unique" rule of immunity should apply to the President. The President's unique role may indeed encompass functions for which he is entitled to a claim of absolute immunity. It does not follow from that, however, that he is entitled to absolute immunity either in general or in this case in particular.

102 S. Ct. at 2725 (White, J., dissenting) (citation omitted).

102 *But see* Note, *Presidential Immunity*, *supra* note 6, at 895-96 (different treatment of President and cabinet officials justified by constitutional distinctions; Constitution vests executive power in President and holds only the President, unlike other federal officials, "equal to the two other branches").

103 *See* Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982); *supra* notes 46-50 and accompanying text.

104 For this reason Chief Justice Burger argued in *Harlow* that Presidential aides should receive absolute immunity under a theory of derivative immunity. Harlow v. Fitzgerald, 102 S. Ct. 2727, 2742-43 (Burger, C.J., dissenting); *see supra* note 46.

105 Harlow v. Fitzgerald, 102 S. Ct. at 2737.

tirely.[106] The plurality obviously did not intend to suggest that the President should be immune from all judicial inquiry. Justice Powell, however, did not offer a constitutional argument to distinguish between the President's involvement as a defendant in a civil suit and his subjection to a criminal prosecution. Furthermore, Justice Powell undermined his own contention by cautioning that the decision in *Nixon v. Fitzgerald* did not necessarily extend to any future law that Congress might pass to limit presidential immunity.[107] Although this type of judicial restraint buttresses Justice Powell's assertion that he considered policy issues only to fill a congressional void,[108] it nonetheless debilitates the force of his argument. As a result, it is unclear whether the plurality merely underplayed the implications of its dictum in the name of judicial restraint or whether in fact, Justice Powell was uncertain of his constitutional analysis.

In addition, the separation-of-powers argument in *Nixon v. Fitzgerald* encompasses all three branches of government. In effect, the plurality held that under the separation-of-powers doctrine the judiciary cannot interfere with the executive's attempt to interfere with the Congress. By bestowing absolute immunity upon the President, the Court thus eliminated a potentially powerful check on his interference with congressional committees.[109] Because the decision hampers congressional control over a recalcitrant executive, by invoking the doctrine of separation of powers one can defeat absolute immunity as easily as one can defend it.[110]

C. The Policy of Granting Absolute Immunity

In the final analysis, the dispute among the Justices degenerated

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106 *See supra* notes 88-89 and accompanying text.

107 *See supra* note 65; *Immunity*, *supra* note 6, at 231.

108 *See* Nixon v. Fitzgerald, 102 S. Ct. at 2701 n.27.

109 Expressing their concern over potential presidential interference with congressional committees, Senator Orrin G. Hatch and Representatives John D. Angell, Robert K. Dorman, Barney Frank, Albert Gore, Jr., A. Toby Moffett, and Patricia Schroeder filed an amicus brief for Respondent Fitzgerald. Amicus Curie Brief for Respondent, Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982).

110 Justice White argued that:

> Insofar as these statutes implicate a separation of powers argument, I would think it to be just the opposite of that suggested by petitioner and accepted by the majority. In enacting these statutes, Congress sought to preserve its own constitutionally mandated functions in the face of a recalcitrant Executive. Thus, the separation of powers problem addressed by these statutes was first of all presidential behavior that intruded upon, or burdened, Congress' performance of its own constitutional responsibilities. It is no response to this to say that such a cause of action would disrupt the President in the furtherance of his responsibilities. That approach iguores the separation of powers problem that lies behind the congressional action; it assumes that presidential functions are to be valued over congressional functions.

102 S. Ct. at 2720-21 (White, J., dissenting) (footnotes omitted).

into a policy debate.[111] Justice Powell rested his policy decisions on two unproved and perhaps unwarranted assumptions. First, he assumed that without absolute liability, the President would be inundated with damage claims.[112] Second, Justice Powell thought that fear of liability paralyzed the chief executive,[113] diverting his time and energy from the demands of his office.[114] No evidence exists, however, that the President would be inundated with claims. As Fitzgerald pointed out in his brief to the Court, governors and high-ranking federal executive officials have enjoyed only qualified immunity since *Scheuer* and *Butz*, yet they have not been flooded by nuisance suits.[115]

Similarly, the plurality's assumption, that without absolute immunity a President would be deterred from taking controversial stands or distracted from his duties, also fails for lack of evidence and reason. Until *Nixon v. Fitzgerald*, the question of presidential immunity itself had remained unsettled. Indeed, the Court's earlier summary affirmance of *Halperin v. Kissinger*[116] indicated that the President would only receive qualified immunity. Nonetheless, Presidents Ford, Carter, and Reagan seemed neither preoccupied by the threat of civil suit nor unwilling to take unpopular stands. No evidence suggests that they misallocated precious time to forestall civil suits.[117]

Of all the possible candidates for absolute immunity, the President, who must confront issues with global ramifications, seems the least likely to be swayed by the possibility of civil suit. With threats of nuclear war, economic disaster, and social unrest to occupy the President, the specter of civil litigation seems tame by comparison. Moreover, the assumption that qualified immunity would deter an honest and well-meaning President from making controversial policy decisions seems no more probable than its converse—that absolute immunity would provide a malicious President with a carte blanche to engage in constitutional violations.[118]

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111 In criticizing the five Justices who voted for absolute immunity, Justice White wrote: "This is policy, not law, and in my view, very poor policy." *Id.* at 2712 (White, J., dissenting).

112 *See id.* at 2703.

113 *See id.* (quoting Ferri v. Ackerman, 444 U.S. 193, 203 (1979)).

114 *See id.*

115 *See* Brief for Respondent at 26-27, Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982).

116 424 F. Supp. 838 (D.D.C. 1976), *aff'd in part per curiam*, 606 F.2d 1192 (D.C. Cir. 1979), *cert. dismissed*, 452 U.S. 713 (1981). In *Kissinger*, the Supreme Court affirmed four-to-four (Justice Rehnquist did not participate) the decision of the district court that President Nixon was not absolutely immune from civil liability for damages arising from violations of the plaintiff's fourth amendment rights. The Court did not issue an opinion, however, and the decision was not particularly significant.

117 *See* Brief for Respondent at 26, Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982).

118 Justice Powell's choice to quote only part of Learned Hand's famous warning in Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950), served as partial evidence that the plurality did not seem to take the risk of malicious, unscrupulous behavior very seriously:

> [T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the *inevitable* danger of its outcome, would dampen the ardor of all

As the Court noted in *Butz*: "[T]he greater power of [high ranking] officials affords a greater potential for a regime of lawless conduct."[119] Certainly the wisdom of promoting a "fearless" executive seems inconsistent with the constitutional notion of limited power through checks and balances.[120]

In the end, one senses that the plurality's argument that liability would paralyze the President masks a more fundamental fear for the stature and reputation of the Presidency, although one might argue that damages are more intrusive than injunctive action because they appear more personally demeaning.[121] This emphasis on the President's reputation, however, is flawed in two respects. First, the President may suffer greater injury if he appears to receive special justice. Second, the President's accountability for other judicial remedies, such as subpoena, are no less embarrassing or damaging to his stature.[122] These forms of judicial "interference" not only weaken the plurality's separation-of-powers argument, but also raise interesting policy questions.

Nixon contended that anything short of absolute immunity from civil liability constituted an intrusion upon the functioning of the President and the stature of his office.[123] One must question, however, how much more intrusive civil liability would be than subjecting the President to a subpoena *duces tecum*,[124] as the Court did in *Nixon v. Administrator of General Services*.[125] There, the Court compelled former President

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but the most resolute, *or the most irresponsible, in the unflinching discharge of their duties*.

Id. (emphasis added to words deleted from Powell's opinion, 102 S. Ct. at 2703 n.32). Despite the plurality's lack of concern, one potential outgrowth of affording absolute immunity to the President, but not to his aides, might be an increase in questionable behavior by the President himself. The holding in *Nixon v. Fitzgerald* would impede the ability of the President to delegate even the most trivial authority and responsibility. A system in which aides could be brought into the courtroom while their superior remained totally immune could promote a President's tendency to hoard authority and responsibility.

119 438 U.S. 478, 506 (1978); *see also* Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (absolute immunity for prosecutors promotes the "vigorous and fearless" performance of their duty); *Immunity, supra* note 6, at 230.

120 Note, Scheuer v. Rhodes: *A Restatement of Absolute Immunity*, 60 IOWA L. REV. 191, 202 (1974); *see also* Becht, *The Absolute Privilege of the Executive in Defamation*, 15 VAND. L. REV. 1127, 1166-67 (1962) (noting that the argument for executive immunity has derived support from the concept of the "fearless official," but suggesting that the contention is unpersuasive).

121 The author wishes to thank Professor Jeremy Rabkin of the Cornell University Government Department for his kind help and provocative criticism in raising the question of reputation.

122 The plurality failed to demonstrate why civil liability constituted impermissible judicial intrusion on the executive, while other forms of judicial processes did not. *See supra* note 88 and accompanying text.

123 *See* Brief for Petitioner at 28-41, Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982).

124 *See* United States v. Nixon, 418 U.S. 683, 706 (1974) (neither the doctrine of separation of powers, nor the President's need for confidentiality, without more, sustains immunity from a subpoena *duces tecum*).

125 433 U.S. 425 (1977).

Nixon to turn over the tapes that he had made of conversations in the Oval Office. This order did more damage to the dignity of the Presidency than Fitzgerald's suit could have ever done. Furthermore, despite the potential pecuniary loss from Fitzgerald's suit, Nixon probably spent more time worrying about the tapes and his prospects for impeachment.

Nixon's experience with the tapes demonstrates that civil liability may be less intrusive than other judicial processes facing the President. Because the President often must confront judicial intervention and consequent diversion from his duties, the plurality in *Nixon v. Fitzgerald* should have explained why it singled out civil liability for different treatment. This need was particularly compelling because civil damages represented Fitzgerald's only remedy.[126]

D. Applying a Functional Analysis to Presidential Immunity

Justice Powell's opinion rejected the functional analysis advocated in *Butz*[127] and elevated the President to a privileged status of immunity that is afforded no other official.[128] One must question, however, whether the difference between absolute and qualified immunity is sufficiently important to the functioning of the Presidency to justify denying Fitzgerald, and others like him, a personal, pecuniary remedy.

Had the Court pursued a functional approach, it could have developed a body of exceptions that deserve absolute immunity.[129] Such ex-

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126 As Justice Harlan explained in his concurrence in *Bivens*, where the sovereign itself remains immune from suit, and injunctive relief is ineffective, the plaintiff's sole remedy is in individual official liability. Thus, for Fitzgerald, the choice was "damages or nothing." *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 410 (1971) (Harlan, J., concurring). *But see* Note, *Presidential Immunity*, *supra* note 6, at 904 ("Prohibiting damage liability against the President would not impede the courts' interest in compensating injured parties . . . . [A]n aggrieved citizen will almost always be able to sue other culpable defendants.").

127 *See supra* notes 77-79 and accompanying text.

128 Although judges, prosecutors, and legislators receive absolute immunity restricted to their particular functions, *see supra* notes 19-21 and accompanying text, *Nixon v. Fitzgerald* gives the President much wider latitude:

> Similarly, THE CHIEF JUSTICE, like the majority, misses the point in his wholly unconvincing contentions that the Court today does no more than extend to the President the same sort of immunity that we have recognized with respect to Members of Congress, judges, prosecutors, and legislative aides. In none of our previous cases have we extended absolute immunity to all actions "within the scope of the official's constitutional and statutory duties. . . ." Indeed, under the immunity doctrine as it existed prior to today's decision, each of these officials could have been held liable for the kind of claim put forward by Fitzgerald—a personnel decision allegedly made for unlawful reasons. Although such a decision falls within the scope of an official's duties, it does not fall within the judicial, legislative, or prosecutorial functions to which absolute immunity attaches. THE CHIEF JUSTICE's failure to grasp the difference between the functional approach to absolute immunity that we have previously adopted and the nature of today's decision accounts for his misunderstanding of this dissent.

102 S. Ct. at 2711 n.2 (footnotes and citations omitted) (White, J., dissenting).

129 Such an approach would comport with the standard of qualified immunity, tempered

ceptions would naturally include actions affecting national security and foreign policy. Thus, courts could easily dispose of the types of suits that Nixon, in his petition for certiorari, warned would be brought as political weapons by individuals disgruntled by the President's foreign policy.[130] Personnel decisions, on the other hand, would fall into the body of functions deserving only qualified immunity. Ironically, Nixon himself described the Fitzgerald affair as merely "a trivial matter—indeed, an internal executive branch personnel dispute. . . ."[131] Although Nixon cautioned that denial of absolute immunity in this case would jeopardize the position of the President,[132] the need for protection is less when dealing with "trivial matters." Moreover, qualified immunity would not necessarily involve an intrusive inquiry into the defendant's subjective motives, but rather an inquiry into the objective qualities of the presidential action itself.[133]

The functional approach, concededly poses some difficulties in administration and in possible hardship on the President. Courts could

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with absolute immunity for certain functions, that currently applies to presidential aides. *See* Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982).

130 Nixon, in his Petition for Certiorari, argued:

> What at present is a suit by a civil servant may well become a suit by an Olympic athlete who claims that the President has intentionally violated his rights in precluding him, but not others, from traveling to the Soviet Union. What today is a suit by a White House staff member whose phone has been tapped to discover the source of leaked information, may become a suit by a foreign service employee claiming that he was held hostage for an excessive period while the President delayed remedial action for political purposes or prolonged his imprisonment by conducting a military action without complying with the War Powers Act. Once the barrier against suing a President for damages is removed, no theory of liability remains implausible.

Petition for Certiorari at 11, Nixon v. Fitzgerald. 102 S. Ct. 2690 (1982).

131 *Id.* at 10.

132 *See id.* at 11-12.

133 The plurality contended that:

> Assuming that the petitioner Nixon ordered the reorganization in which respondent lost his job, an inquiry into the President's motives could not be avoided under the kind of "functional" theory asserted both by the respondent and the dissent. Inquiries of this kind could be highly intrusive.

102 S. Ct. at 2705. Justice White argued that the plurality's emphasis on subjective intent was flawed:

> The majority also seems to believe that by "function" the Court has in the past referred to "subjective purpose." See *ante*, at 2706 ("an inquiry into the President's motives could not be avoided under the . . . 'functional' theory . . . ."). I do not read our cases that way. In *Stump v. Sparkman*, 435 U.S. 349, (1978), we held that the factors determining whether a judge's act was a "judicial action" entitled to absolute immunity "relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties." Neither of these factors required any analysis of the purpose the judge may have had in carrying out the particular action. Similarly in *Butz v. Economou*, 438 U.S. at 512-16, when we determined that certain executive functions were entitled to absolute immunity because they shared "enough of the characteristics of the judicial process," we looked to objective qualities and not subjective purpose.

Id. at 2723 n.34 (White, J., dissenting) (citations omitted).

have difficulty delineating which presidential functions deserve absolute immunity; the President may not know until trial whether a certain function would receive absolute or only qualified immunity.[134] In addition, he might need to expend significant amounts of time and money in defending unfounded accusations.[135] These problems, however, do not outweigh the advantages of applying a functional analysis, particularly in light of the alternatives available to reduce interference with the Presidency. For instance, the Court could hold the President absolutely immune from suit until the completion of his tenure in office.[136] Although this solution does not address the problem of deterring certain discretionary behavior, it does spare the President's valuable time and energy while in office. Alternatively, the Court could shift the burden of proof to the plaintiff. Currently the burden "rests on the official asserting the claim"[137] to show the need for absolute immunity. If the plaintiff were to bear the burden of proving that the President should not receive absolute immunity for a particular function of his office, then courts could easily identify and dismiss undeserving claims.

Despite the advantages of the functional approach, and barring some sudden and unforeseen reversal by the Court, the President is now entitled to absolute immunity from civil liability for all actions within the scope of his office. The aggrieved plaintiff may still argue that the President acted outside the scope of his authority.[138] Yet, because the

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134 *See* Butz v. Economou, 438 U.S. 478, 527 (1978) (Rehnquist, J., dissenting).

135 Chief Justice Burger contended:

> This very case graphically illustrates the point. When litigation processes are not tightly-controlled—and often they are not—they can be and are used as mechanisms of extortion. Ultimate vindication on the merits does not repair the damage.

102 S. Ct. at 2709 (Burger, C.J., concurring) (footnote omitted). In his brief to the Court, Nixon argued:

> Recent decisions have lowered other obstacles to litigation. As this case illustrates, it is now easy for any reasonably-imaginative counsel to plead an implied right of action, based on a federal statute or Constitutional provision, that will survive a motion to dismiss.

Brief for Petitioner at 33, Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982) (citations omitted).

The possibility that the President might be confronted with groundless harassment suits, however, is still more desirable than the alternative of absolute immunity. Furthermore, one might question just how often these suits would arise, and how serious a problem they would pose for a President who did not engage in "dirty tricks."

136 Fitzgerald emphasized that because Nixon was no longer in office when the suit was brought, many of the policy reasons against suing an incumbent should not apply. In response to the argument that Presidents could be sued after leaving office, Nixon asserted:

> Moreover, even if suits could be postponed until after Presidents have left office, an alternative that would prejudice them, immunity would still be justified as a means of assuring that Presidents will not function under a constant threat, resulting from both the costs of litigation and the possibility of ultimate liability, aimed at their personal estates.

Brief for Petitioner at 29, Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982).

137 Harlow v. Fitzgerald, 102 S. Ct. 2727, 2736 (1982).

138 Chief Justice Burger, in his concurrence, admitted that:

Court cited with approval the deferential test of *Spalding v. Vilas*,[139] one has difficulty imagining many of the President's activities that the Court would deem outside the scope of his office.[140]

CONCLUSION

In *Nixon v. Fitzgerald,* the Court balanced the importance of freeing the President from the threat of civil liability against the principle of providing aggrieved plaintiffs the right to redress. In so doing, the Court accorded undue deference to the unique nature and function of the Presidency. Rather than abandon the functional approach advocated in *Butz*, the Court should have granted the President qualified immunity from civil suits, while providing absolute immunity only for certain highly sensitive functions. The President should be held liable for monetary damages when he knowingly violates a plaintiff's constitutional rights. Far from infringing upon the doctrine of separation of powers, judicial enforcement of the plaintiff's constitutional rights—es-

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> This is not to say that, in a given case, it would not be appropriate to raise the question *whether* an official—even a President—had acted within the scope of the official's constitutional and statutory duties. The doctrine of absolute immunity does not extend beyond such actions.

102 S. Ct. at 2708 n.4. (Burger, C.J., concurring). The plurality, however, dispelled any question of how broadly it would interpret the "scope of authority" limitation:

> Because Congress has granted this legislative protection, respondent argues, no federal official could, within the outer perimeter of his duties of office, cause Fitzgerald to be dismissed without satisfying this standard in prescribed statutory proceedings.
>
> This construction would subject the President to trial on virtually every allegation that an action was unlawful, or was taken for a forbidden purpose. Adoption of this construction thus would deprive absolute immunity of its intended effect. It clearly is within the President's constitutional and statutory authority to prescribe the manner in which the Secretary will conduct the business of the Air Force . . . . Because this mandate of office must include the authority to prescribe reorganizations and reductions in force, we conclude that petitioner's alleged wrongful acts lay well within the outer perimeter of his authority.

102 S. Ct. at 2705; *see also* Brief for Petitioner at 48, Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982) ("These standards [of the scope of the President's duty] are formulated broadly in order to assure that the determination of whether a claim falls within the scope of an official's immunity does not collapse into the merits of the claim against him."); *Immunity*, *supra* note 6, at 228 n.18.

139 Nixon v. Fitzgerald, 102 S. Ct. at 2705 (citing Spalding v. Vilas, 161 U.S. 483 (1896)); *see supra* notes 9-12 and accompanying text.

140 Should the Court ever wish to overturn this case sub silentio, it could read the test so narrowly that the issue of the scope of authority would collapse into the merits of the claim. For example, the Court could hold that because the claim involves a constitutional violation and constitutional violations are not within the scope of a President's authority, he cannot be immune.

Butz could be read this way if pushed to its logical extreme. Moreover, even though such reasoning seems strained and artificial, the Court entertained a similar interpretation in *Ex Parte* Young, 209 U.S. 123, 159-160 (1908) (even though sovereign is immune, official must be "stripped of his official or representative character and . . . subjected in his person to the consequences of his individual conduct").

pecially when the right to give unfettered congressional testimony is concerned—would reinforce the strength of our constitutional system.

Aviva A. Orenstein