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Absolute Presidential Immunity from Civil Damages Liability

Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982).

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 officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.¹

I. INTRODUCTION

This statement by Justice Miller expresses a sentiment with which nearly all Americans would wholeheartedly agree. In this land where all men are created equal, every person must obey the laws of the community and the nation or pay the penalty for his failure to do so. This principle, in the abstract, would go unchallenged. However, as is so often the case, when principles are translated into policies, the national consensus vanishes and disagreements arise. It can be rationally argued that the public welfare will best be served when certain persons are not subject to all the laws of the land. The concept of public officer immunity from private tort actions has been around for centuries and has been applied by federal, state, and local courts to various public officers ranging from local school board members² to members of the President's cabinet.³ In the recent case of *Nixon v. Fitzgerald*,⁴ the United States Supreme Court, for the first time, addressed the issue of the extent to which the President of the United States is entitled to immunity from civil actions. The Court's five to four decision⁵ allowing the President absolute immunity from civil

1. *United States v. Lee*, 106 U.S. 196, 220 (1882) (per Miller, J.).

2. *Wood v. Strickland*, 420 U.S. 308 (1975).

3. *Butz v Economou*, 438 U.S. 478 (1978).

4. 102 S. Ct. 2690 (1982).

5. Justice Powell delivered the opinion of the Court in which he was joined by Justices O'Connor, Stevens, Rehnquist, and Chief Justice Burger, who also filed a separate concurring opinion. Justice White filed a dissenting opinion in which he was joined by Justices Brennan, Marshall, and Blackmun. Justice Blackmun also filed a separate dissent.

suits arising from actions taken by him within "the outer perimeter of his authority,"⁶ draws into question the actual validity of the principle that "no man is above the law." This Note will examine the Court's decision in *Nixon v. Fitzgerald* and will endeavor to assess the probable impact of that decision on the future course of executive officer immunity.

II. SOVEREIGN IMMUNITY IN PERSPECTIVE

The concept of sovereign immunity has a long history in the common law and in the statutes of this country. Originally, the theory was derived from the legal principle that "the king can do no wrong."⁷ After the demise of the absolute monarch, the same principle became the foundation of the concept of sovereign immunity.⁸ Of course, such immunity was no longer justified by the divine right of kings, but, by the mid-nineteenth century, it was being defended as vital for the efficient operations of the government.⁹

Not only was the state itself immune, some of its officers might also claim immunity for the actions they took while acting under the authority derived from the state. The common law has long recognized the absolute immunity of judges in their judicial function.¹⁰ That principle was recognized by the United States Supreme Court in *Bradley v. Fisher*,¹¹ and was recently reaffirmed in *Stump v. Sparkman*.¹² Absolute judicial immunity has also been granted to prosecutors¹³ and other executive officers performing essentially judicial functions.¹⁴ Members of Congress also enjoy absolute immunity for acts taken pursuant to their legisla-

6. 102 S. Ct. at 2705.

7. "[T]he law ascribes to the king, in his political capacity, absolute perfection. The king can do no wrong. . . ." Gray, *Private Wrongs of Public Servants*, 47 CALIF. L. REV. 303, 307 n.17 (1959) (quoting from 1 W. BLACKSTONE, COMMENTARIES 246-47 (Jones ed. 1915)). See also *Developments in the Law, Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 830 (1957).

8. See *Developments in the Law*, *supra* note 7, at 830.

9. *Id.*

10. See *Terry v. Huntington*, 145 Eng. Rep. 557 (Ex. 1659); *The Case of the Marshalsea*, 77 Eng. Rep. 1027 (P.C. 1613); *Floyd v. Barker*, 77 Eng. Rep. 1305 (Star Chamber 1607).

11. 80 U.S. (13 Wall.) 335 (1872). "[I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." *Id.* at 347.

12. 435 U.S. 349 (1978).

13. *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Yaselli v. Goff*, 12 F.2d 396 (2nd Cir. 1926), *aff'd*, 275 U.S. 503 (1927).

14. *Butz v. Economou*, 438 U.S. 478 (1978). The executive officers granted absolute immunity in *Butz* included the chief hearing examiner, the judicial officer, and the prosecuting attorney. *Id.* at 511.

tive function as guaranteed by the speech and debate clause of the United States Constitution.¹⁵

Among the first cases in which the Supreme Court applied immunity principles to a federal executive officer was the 1845 decision of *Kendall v. Stokes*.¹⁶ However, the immunity recognized by that Court was not absolute. In that case, Kendall, Postmaster General of the United States, was held liable for damages resulting from his wrongful refusal to pay a sum of money to the plaintiffs. However, the Court decided that he should not be liable for a non-malicious mistake made in the performance of his public duty.¹⁷ Impliedly, the question of absolute immunity, immunizing even malicious actions by federal officers, was left undecided.

The question of immunity for federal officers again came before the Supreme Court fifty-one years later. Once again the case involved a suit against the Postmaster General of the United States. In *Spalding v. Vilas*,¹⁸ the Postmaster General had been sued by Spalding who alleged malicious defamation and interference with certain contracts held by Spalding.¹⁹ The Court held that the Postmaster General's actions had not exceeded his authority.²⁰ Relying on previous Supreme Court decisions granting absolute immunity to judges²¹ and on English precedent extending such im-

15. U.S. CONST. art. I, § 6, cl. 1 ("and for any Speech or Debate in either House, they shall not be questioned in any other Place"). See also *Gravel v. United States*, 408 U.S. 606 (1972). The Supreme Court recognized a similar immunity for state legislators in *Tenney v. Brandhove*, 341 U.S. 367 (1951).

16. 44 U.S. (3 How.) 87 (1845).

17. *Id.* at 98-99.

18. 161 U.S. 483 (1896).

19. *Id.* at 486. The plaintiff, Spalding, had been engaged by several local postmasters to lobby the postal department and the Congress to grant the postmasters the pay increases to which they felt they were entitled by law. Congress did eventually grant the pay increases but the law authorizing the payments also stipulated that the payments of back wages were to be made directly to the postmaster-claimants rather than to persons having a power of attorney for the claimants. Spalding happened to hold a power of attorney from many of the postmasters. The Postmaster General included a letter with the payments reciting terms of the congressional act and emphasizing the provision that powers of attorney were invalid for purposes of the distribution of the payments. The plaintiff claimed that as a result of this letter many of his clients repudiated their contracts with him causing him financial loss. Furthermore, he alleged that the Postmaster General maliciously intended to cause the post masters to believe that Spalding's claim for valuable services was false and fraudulent. Therefore, he was suing the Postmaster General for resulting damages totalling \$100,000. *Id.* at 484-89.

20. *Id.* at 493.

21. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872); *Randall v. Brigham*, 74 U.S. (7 Wall.) 523 (1868).

munity to other officials,²² the Court extended absolute immunity to heads of executive departments.²³ Thus, the Postmaster General could not be held liable no matter how malicious his intent. Such intentions would be beyond inquiry in a civil action. The Court said that the head of an executive department "should not be under any apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages,"²⁴ and went on to explain that "it would seriously cripple the proper and effective administration of public affairs . . . if he were subject to any such restraint."²⁵

Another half century passed before the Supreme Court again addressed the issue of absolute immunity for federal executives.²⁶ In *Barr v. Matteo*,²⁷ a plurality opinion written by Justice Harlan recognized absolute immunity for executive officers of non-cabinet rank. That opinion also discussed the rationales supporting absolute executive immunity:

[O]fficials of government should be free to exercise their duties unembarrassed by fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous and effective administration of policies of government.²⁸

22. Lord Rokeby, 8 L.R.-Q.B. 255 (1873); *Dawkins v. Lord Paulet*, 5 L.R.- Q.B. 94 (1869).

23. 161 U.S. at 498.

We are of the opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law.

Id.

24. *Id.*

25. *Id.*

26. While the Supreme Court was silent, the lower federal courts were active in extending absolute immunity to federal officials other than heads of executive departments. See, e.g., *Taylor v. Glotfelty*, 201 F.2d 51 (6th Cir. 1952) (prison psychiatrist); *Papagianakis v. The Samos*, 186 F.2d 257 (4th Cir. 1950), *cert. denied*, 341 U.S. 921 (1951) (immigration officer); *Jones v. Kennedy*, 121 F.2d 40 (D.C. Cir.), *cert. denied*, 314 U.S. 665 (1941) (SEC commissioner); *Cooper v. O'Connor*, 99 F.2d 135 (D.C. Cir.), *cert denied*, 305 U.S. 643 (1938) (FBI agent).

27. 360 U.S. 564 (1959). The acting director of the Department of Rent Stabilization was sued for libel by two employees whom he had criticized in a departmental press release. *Id.* at 567 n.5.

28. *Id.* at 571. Justice Harlan also quoted from an opinion by Judge Learned Hand which is often cited in support of absolute immunity:

It does indeed go without saying that an official who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not es-

In essence, it was believed that a certain amount of misconduct by government officials had to be tolerated if the government was to operate at peak efficiency.

Whatever might have been the merits of that trade-off, Harlan's plurality opinion in *Barr v. Matteo* probably represented the high point in the application of absolute immunity.²⁹ Since *Barr* was handed down, the Court has been moving away from absolute immunity in favor of allowing only qualified immunity. This switch was no doubt prompted, at least in part, by the increased use of section 1983³⁰ actions by citizens seeking redress from state officials for violation of their civil rights.

Section 1983, part of a civil rights act passed by Congress in the aftermath of the Civil War, created a right in civil action against persons acting under color of state law who violate a plaintiff's civil rights. In *Tenney v. Brandhove*,³¹ the Supreme Court held that section 1983 had not eliminated the traditional immunity of state legislators and therefore such an action could not be brought

cape liability for the injuries he may so cause 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 that to 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 but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. . . . [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

Id. (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

Another commentator has suggested that the growth of the absolute immunity rule can be attributed to "its convenience as a form of judicial shorthand to dispose, at the pleading stage, cases which rather obviously have little merit." Gray, *supra* note 7, at 338.

29. Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 Nw. U.L. REV. 526, 531 (1977). In *Barr v. Matteo*, Justice Brennan and Chief Justice Warren, joined by Justice Douglas, dissented vigorously from the Court's application of absolute immunity. 360 U.S. at 578, 586.

30. 42 U.S.C. § 1983 (1976 & Supp. III 1979).

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

31. 341 U.S. 367 (1951).

against a legislator acting within his legislative function.³² *Pierson v. Ray*,³³ following sixteen years after *Tenney*, utilized the same rationale to reaffirm the common law immunity of state judges.³⁴ However, the Court also held that a police officer in a section 1983 action is entitled to only qualified immunity based on probable cause and good faith.³⁵

The Supreme Court built upon its finding of a qualified good faith immunity a few years later in the decision in *Scheuer v. Rhodes*.³⁶ The district court had dismissed a section 1983 suit against several Ohio officials, including the Governor, on grounds that those officials enjoyed an absolute immunity from civil liability under state law.³⁷ The Supreme Court reversed that holding of the district court and remanded the case for further proceedings on the merits.³⁸ In so doing, the Court held that state executive officers were entitled to an absolute immunity of a varying scope, 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 action on which liability is sought to be based.³⁹

Following *Scheuer v. Rhodes*, the Supreme Court applied the principle of qualified immunity to a variety of state officials sued under section 1983.⁴⁰ This created an anomalous situation

32. "We cannot believe that Congress . . . would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us." *Id.* at 376.

33. 386 U.S. 547 (1967).

34. "The immunity of judges for acts within the judicial role is . . . well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine." *Id.* at 554-55. Justice Douglas' dissenting opinions in both *Tenney*, 341 U.S. at 381, and *Pierson*, 386 U.S. at 558, are good expositions of the arguments for the belief that § 1983 had been intended to abolish the common law immunity of both state legislators and judges.

35. 386 U.S. at 557.

36. 416 U.S. 232 (1974). In that case, the Governor of Ohio and various other state executive officials had been sued under § 1983 for civil rights violations stemming from the National Guard's actions during the anti-war disturbances at Kent State in 1970. *Id.* at 235-36.

37. *Id.* at 234-35.

38. *Id.* at 250.

39. *Id.* at 247. The Court also went on to detail a test for determining when an official should be entitled to immunity: "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." *Id.* at 247-48.

40. See, e.g., *Procunier v. Navarette*, 434 U.S. 555 (1978) (prison administrator); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (superintendent of a state hospital); *Wood v. Strickland*, 420 U.S. 308 (1975) (school administrators).

whereby state officials being sued under section 1983 for violations of civil rights would be entitled only to qualified immunity, while similarly situated federal officers being sued under a *Bivens*⁴¹ cause of action for violations of the same civil rights would, under the precedents of *Barr* and *Spalding*, be entitled to absolute immunity. Not surprisingly, the Court acted fairly quickly to rectify this situation. Four years after *Scheuer* limited state officials' immunity for section 1983 actions, the Court in *Butz v. Economou*⁴² applied a similar standard of immunity to federal officials being sued for constitutional violations under *Bivens*.⁴³ While not expressly overturning the precedents of *Barr* and *Spalding*,⁴⁴ *Butz* certainly makes it clear that federal officials could no longer automatically rely on an absolute immunity from civil liability.⁴⁵

41. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). *Bivens* created an implied federal cause of action to allow a remedy for constitutional violations and for violations of federally protected rights by federal agents. *Id.* at 390-97.

42. 438 U.S. 478 (1978). In *Butz*, Economou was a commodity futures commission merchant who had apparently been very critical of the Commodity Exchange Authority and the Department of Agriculture. In 1970, following an audit, the Department of Agriculture sought to revoke or suspend Economou's company's registration. After a lengthy battle in the agency and eventually in the courts, Economou was able to keep his license. He then sued the Secretary and Assistant Secretary of Agriculture as well as various other officials who had been involved in his case. Economou sought damages for various violations of federal law and for an alleged violation of his first amendment right of freedom of speech. *Id.* at 481-82.

43. *Id.* at 504.

[W]e deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials. . . . To 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.

Id.

44. Justice White's opinion for the Court in *Butz* went to great lengths to distinguish rather than overturn those precedents. *Id.* at 489-95. Justice White pointed out that unlike *Butz*, neither *Barr* nor *Spalding* involved an alleged violation of constitutional rights. *Id.* at 495. Justice White's opinion seems to accept the precedent of *Barr* and *Spalding* as applied to state tort claims but denies that they apply to claims concerning federal violations brought under a *Bivens*-type cause of action. *Id.* at 495.

45. Assuming that *Barr* and *Spalding* as limited by *Butz* are still good precedent, their value to a federal executive would probably be quite minimal. Presumably such an executive could still claim immunity from an action alleging certain torts. For example, because slander is merely a state tort and would not implicate any federally protected rights, an executive should be immune from suit. However, any such protection would likely be merely illusory because of, as Justice Rehnquist points out in his dissent in *Butz*, "the ease with which a constitutional claim may be pleaded in a case such as this." *Id.* at 522 (Rehnquist, J., dissenting).

After *Butz* removed the bar of absolute immunity from actions against federal executives, it was perhaps inevitable that someone would bring suit against the President. The most prominent suit was filed in the United States District Court for the District of Columbia by Morton Halperin⁴⁶ seeking damages for the violation of Halperin's civil rights resulting from an alleged phone tap on Halperin's home phone during the Nixon administration. The district court denied the President's claim of immunity and entered judgment against President Nixon, Attorney General John Mitchell, and Henry Kissinger.⁴⁷ Nominal damages of one dollar were awarded.⁴⁸ On appeal,⁴⁹ in an opinion written by Judge Skelly Wright, the court held that the President was not entitled to absolute immunity from civil suit.⁵⁰ Nixon appealed and when the Supreme Court granted certiorari⁵¹ many observers hoped that the Court would resolve the question of presidential immunity from liability.⁵² However, when the Supreme Court decided the case, the court of appeals' decision was merely affirmed per curiam by an equally divided vote with Justice Rehnquist taking no part in the decision,⁵³ and with no opinion issued. Thus, the question of presidential immunity from civil actions was left unresolved. However, on the same day it decided *Halperin*, the Court granted certiorari to hear the case of *Nixon v. Fitzgerald*.⁵⁴ Once again the Supreme Court would have a chance to decide the issue of presidential immunity.

46. *Halperin v. Kissinger*, 424 F. Supp. 838 (D.D.C. 1976).

47. *Id.* at 846.

48. *Halperin v. Kissinger*, 434 F. Supp. 1193, 1196 (D.D.C. 1977), *rev'd on other grounds*, 606 F.2d 1192 (D.C. Cir. 1979), *aff'd by an equally divided Court*, 452 U.S. 713 (1981).

49. *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), *aff'd by an equally divided Court*, 452 U.S. 713 (1981).

50. 606 F.2d at 1208-13. The Court of Appeals listed three reasons why the President was not entitled to absolute immunity. First, the Constitutional scheme does not provide any kind of immunity for the President or the Executive Branch. Second, separation of powers does not immunize the President. Third, absolute immunity is not required to protect the ability of the President to efficiently perform his function. *Id.* at 1211-12.

51. 446 U.S. 951 (1980).

52. See *Clark v. United States*, 624 F.2d 3 (2nd Cir. 1980) (pending suit against Nixon stayed pending possible resolution of the immunity question by the Court in *Halperin*). See generally Note, *Presidential Immunity from Constitutional Damage Liability*, 60 B.U.L. REV. 879 (1980); Note, *Halperin v. Kissinger: The D.C. Circuit Rejects Presidential Immunity from Damage Actions*, 26 LOY. L. REV. 144 (1980).

53. 452 U.S. 713 (1981).

54. 452 U.S. 959 (1981).

III. *NIXON v. FITZGERALD*

A. The Background

Nixon v. Fitzgerald,⁵⁵ like *Halperin v. Kissinger*, involved a suit seeking civil damages from former President Nixon for actions allegedly taken by Nixon during his term of office. The plaintiff, A. Ernest Fitzgerald, had been employed as a management analyst with the Department of the Air Force. In November 1968, Fitzgerald testified before a congressional subcommittee concerning massive cost overruns on the development of the C-5A transport plane.⁵⁶ Fitzgerald's testimony received national publicity and embarrassed and angered officials in the Department of Defense.⁵⁷ Subsequently in January 1970, Fitzgerald was dismissed from his position with the government, ostensibly as a part of a departmental reorganization.⁵⁸ On January 20, 1970, Fitzgerald complained to the Civil Service Commission alleging that he had been fired in retaliation for his testimony to Congress.⁵⁹ The Civil Service Commission held public hearings commencing on January 26, 1973, and issued a decision on September 18, 1973.⁶⁰ The hearing examiner concluded that Fitzgerald's firing had been motivated by reasons purely personal to Fitzgerald and thus violated applicable civil service regulations.⁶¹ Eventually, after having filed an enforcement action in the district court, Fitzgerald reached a settlement with the Air Force whereby Fitzgerald was reassigned to his old position and received backpay.⁶² After the Civil Service Commission had issued its decision, Fitzgerald filed a suit for damages in district court⁶³ alleging the existence of a "continuing conspiracy to deprive him of his job, to deny him reemployment, and to besmirch his reputation."⁶⁴ Alexander Butterfield, White House aide, one or more unnamed White House aides, and eight Defense Department officials were named as defendants.⁶⁵ Nixon was added as a defendant through an amended complaint in 1978.⁶⁶

The district court stated that Fitzgerald's cause of action was based on two federal statutes and the first amendment to the Con-

55. 102 S. Ct. 2690 (1982).

56. *Id.* at 2694.

57. *Id.* at 2694 n.1.

58. *Id.* at 2693.

59. *Id.* at 2695.

60. *Id.*

61. *Id.* at 2696.

62. *Id.* at 2696 n.17.

63. *Id.* at 2696.

64. *Id.* at 2696 n.18. See *Fitzgerald v. Seamans*, 384 F. Supp. 688 (D.D.C. 1974).

65. 102 S. Ct. at 2696.

66. *Id.* at 2697.

stitution.⁶⁷ The district court denied Nixon's motion for summary judgment on the immunity issue and Nixon took an interlocutory appeal to the court of appeals which dismissed summarily.⁶⁸ Finally the Supreme Court granted certiorari⁶⁹ in order to resolve the question of the scope of immunity available to the President.⁷⁰

B. The Holding

The Court's resolution of the question of the scope of the immunity available to the President is really quite simple and clear-cut, almost alarmingly so. After briefly reviewing previous cases dealing with executive immunity, the Court simply stated: "Applying the principles of our cases to claims of this kind, we hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts."⁷¹ Lest there be any doubt about the absolute nature of this immunity, the Court borrowed a phrase from Justice Harlan's plurality opinion in *Barr v. Matteo*,⁷² and stated that the Court recognizes "absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility."⁷³ Because the President has discretionary responsibilities in a broad variety of areas,⁷⁴ it is really rather hard to imagine any action taken by a President in his official capacity which would not be entitled to immunity, or as the dissent phrased it: "[The President] would be immune [from suit] regardless of the damage he inflicts, regardless of how violative of the statute and of the Constitution he knew his conduct to be, and regardless of his purpose."⁷⁵

In order to support this broad grant of immunity, the Court marshals a veritable hodgepodge of arguments. These can be roughly categorized into three areas of concern.

67. *Id.* 5 U.S.C. § 7211 (Supp. V 1981) provides that "[t]he right of employees . . . to . . . furnish information to either House of Congress, or to a committee or a Member thereof, may not be interfered with or denied." 18 U.S.C. § 1505 (1976) makes it a crime to obstruct congressional testimony.

68. 102 S. Ct. at 2697.

69. 452 U.S. 959 (1981).

70. 102 S. Ct. at 2697.

71. *Id.* at 2701.

72. 360 U.S. 564 (1959).

73. 102 S. Ct. at 2705.

74. *Id.*

75. *Id.* at 2710 (White, J., dissenting). The opinion of the Court does allow for one possible exception to the President's absolute immunity. Fitzgerald's case dealt only with a *Bivens*-type implied cause of action; therefore, this decision was limited in application to that type of cause of action. The Court explicitly leaves open the question of the scope of the immunity available if the Congress were to act specifically to create a cause of action against the President. See *id.* at 2701 n.27.

First, the President, as the chief constitutional officer of the Executive Branch, "occupies a unique position in the constitutional scheme."⁷⁶ The Court pointed out that because of his unique position the President is entrusted with "supervisory and policy responsibilities of utmost discretion and sensitivity."⁷⁷ The Court cited this "unique position" of the President as a justification for differentiating the President from state governors and cabinet officers and thereby distinguishing the precedents of *Scheuer v. Rhodes*⁷⁸ and *Butz v. Economou*⁷⁹ which granted such officers only qualified immunity.⁸⁰

The Court also derived two related arguments from this "unique position" claimed by the President. First, because of the prominence of the President's office, his visibility, and the broad effects of his actions, the Court believed that "the President would be an easily identifiable target for suits for civil damages."⁸¹ The Court even compared the Office of the President to that of judges and prosecutors for whom absolute immunity is well established, in that "a President must concern himself with matters likely to 'arouse the most intense feelings.'"⁸² Second, the Court feared that if the President were to be constantly hauled into court to answer for and justify his actions, he might be rendered "unduly cautious in the discharge of his official duties."⁸³ Because of the President's "unique position," concern over such a possibility, in the view of the Court, became "compelling."⁸⁴

The Court's second argument supporting absolute immunity for the President was based on the constitutional doctrine of separation of powers. The majority opinion recognized that the President is not immune from all judicial process because of the separation of powers doctrine.⁸⁵ As Chief Justice Burger said in

76. *Id.* at 2702. See also U.S. CONST. art. II, § 3.

77. 102 S. Ct. at 2702. According to the Court, these responsibilities include enforcement of federal law, the conduct of foreign affairs, and management of the Executive Branch. *Id.*

78. 416 U.S. 232 (1974). See *supra* notes 36-38 and accompanying text.

79. 438 U.S. 478 (1978). See *supra* notes 42-45 and accompanying text.

80. 102 S. Ct. at 2702.

81. *Id.* at 2703.

82. *Id.* (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)).

83. 102 S. Ct. at 2703 n.32.

84. *Id.* at 2703.

85. See *United States v. Nixon*, 418 U.S. 683 (1974) (The Supreme Court denied President Nixon's motion to quash a subpoena duces tecum ordering him to produce evidence for use in a criminal trial.); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (After President Truman issued a Presidential Order seizing the nation's steel mills in order to prevent a nationwide strike, the Supreme Court upheld the issuance of an injunction forbidding enforcement of the Presidential Order.).

United States v. Nixon: "[N]either the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."⁸⁶ However, the Court also cited *United States v. Nixon*⁸⁷ and *Nixon v. Administrator of General Services*⁸⁸ for the proposition that courts must "balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and function of the Executive Branch."⁸⁹ Holding that there is a "lesser public interest in actions for civil damages than . . . in criminal prosecutions,"⁹⁰ the Court concluded that a "merely private suit for damages" does not warrant the exercise of jurisdiction over the President.⁹¹

The Court's final justification for a rule of absolute immunity was that such a rule "will not leave the Nation without sufficient protection against misconduct on the part of the chief executive."⁹² Most prominent is the remedy of impeachment, and the Court also listed various formal and informal checks on Presidential actions, including, "constant scrutiny by the press," "vigilant oversight by Congress," "a desire to earn reelection," "the need to maintain [Presidential] prestige" and "a President's traditional concern for his historical stature."⁹³

C. Analysis

The proper place to commence an analysis of the Court's decision in *Nixon v. Fitzgerald* is to evaluate the rationales put forward by the Court to support its decision. The Court's first argument was that the President's "unique position" entitles him to the additional protections of absolute immunity.⁹⁴ Concededly, the President occupies a "unique position" in our constitutional scheme. As the head of an entire branch of our government he is certainly possessed of a great deal of power and burdened with an equally great weight of responsibilities. The Court cites these factors as reasons for believing that the President should not be forced to submit to the additional burden of possible liability for

86. 418 U.S. at 706.

87. 418 U.S. 683 (1974).

88. 433 U.S. 425 (1977).

89. 102 S. Ct. at 2704.

90. *Id.* at 2704 n.37.

91. *Id.* at 2704.

92. *Id.* at 2705-06. The Court cited cases granting absolute immunity to prosecutors and judges for the proposition that the existence of alternative remedies justified the existence of absolute immunity. *See id.* at 2706 nn.38 & 39.

93. *Id.* at 2706.

94. *See supra* notes 76-84 and accompanying text.

his actions in civil suits. However, the existence of broad Presidential powers might also be cited for the opposite proposition. In referring to the power possessed by lower federal executive officials, the Supreme Court has said:

The broad authority possessed by these officials enables them to direct their subordinates to undertake a wide range of projects—including some which may infringe such important personal interests as liberty, property and free speech Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct.⁹⁵

If this was true of the cabinet member in *Butz*, it is also likely to be true of the greater power of the President. Furthermore, considering the uniquely powerful position of the President, it seems unlikely that the rather remote possibility⁹⁶ of liability for civil damages will, as the Court asserts, render the President “unduly cautious in the discharge of his official duties.”⁹⁷

While asserting that the President occupies a unique position in our constitutional scheme, the Court failed to establish why that unique position entitled him to a unique standard of immunity.⁹⁸ Justice White’s dissent argued that the Court should apply the same “functional” test to the question of Presidential immunity that it has applied in previous immunity decisions.⁹⁹ Such a “functional test” would allow for absolute immunity only for those aspects of Presidential power and authority which could be shown to be deserving of such immunity.¹⁰⁰ The Court, however, rejected

95. *Butz v. Economou*, 438 U.S. 478, 505-06 (1978).

96. The Court asserts that the dangers of such suits are significant. Nevertheless, it concedes that there is “no historical record of numerous suits against the President.” 102 S. Ct. at 2703 n.33.

97. *Id.* at 2703 n.32. See Justice Brennan’s dissent in *Barr v. Matteo*:

[T]he courts should be wary of any argument based on the fear that subjecting governmental officers to the nuisance of litigation and the uncertainties of its outcome may put an undue burden on the conduct of the public business. Such a burden is hardly one peculiar to public officers; citizens generally go through life subject to the risk that they may, though in the right, be subject to litigation and the possibility of a miscarriage of justice [T]he way to minimizing the burdens of litigation does not generally lie through the abolition of a right of redress for an admitted wrong.

Barr v. Matteo, 360 U.S. 564, 588-89 (1959) (Brennan, J., dissenting).

98. *See id.* at 2725 (White, J., dissenting).

99. *See, e.g., Butz v. Economou*, 438 U.S. 478, 517 (1978) (executive officials are immune while performing judicial functions); *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976) (prosecutor immune with respect to his activities as an advocate); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 354 (1872) (judges are absolutely immune from civil suit while “exercising their judicial function within the general scope of their jurisdiction”).

100. Under such a theory, certain aspects of a President’s authority would be absolutely immune. For example, a court might conclude that Presidential actions involving foreign affairs are so sensitive that that Presidential function should be accorded absolute immunity.

the application of such a test,¹⁰¹ arguing that it would be difficult to determine which Presidential function was involved in a particular case.¹⁰² The Court also argued that a "functional" test would often require inquiry into a President's motives in taking actions and that such inquiries could be highly intrusive.¹⁰³

Such an argument is not without force. As the Court has stated previously: "The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial."¹⁰⁴ The test for liability of officials with only qualified immunity established in *Wood v. Strickland*¹⁰⁵ and applied to federal officials in *Butz v. Economou*¹⁰⁶ would require inquiry into the subjective intent of the official. In order to avoid intrusiveness from obviously frivolous suits, the Court has recommended use of summary judgments to rid the dockets of obviously unsupported suits, thereby reducing the danger of intrusiveness.¹⁰⁷ However, lower courts have found that the subjective element of the *Wood v. Strickland* test is difficult to resolve through summary judgment.¹⁰⁸ Thus, even rather frivolous suits might require a good deal of intrusion in order to be resolved.

Notwithstanding, a good deal of the force of this argument was destroyed when in *Harlow v. Fitzgerald*,¹⁰⁹ a companion case to *Nixon v. Fitzgerald*, the Court modified the *Wood v. Strickland* test. In order to increase the possibility of resolving such suits through summary judgments,¹¹⁰ the Court eliminated the subjective half of the *Wood v. Strickland* test.¹¹¹ Furthermore, the

101. 102 S. Ct. at 2705.

102. *Id.*

103. *Id.*

104. *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976).

105. 420 U.S. 308 (1975). Under the test set forth in *Wood*, a defendant would be liable if "he knew or reasonably should have known that the action he took . . . would violate the constitutional rights of the [person] affected, or if he took the action with malicious intention to cause a deprivation of constitutional rights or other injury . . ." *Id.* at 322. Proof of either half of the test is sufficient to result in liability.

106. 438 U.S. 478, 498 (1978).

107. *See Butz v. Economou*, 438 U.S. at 508.

108. *See Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979). "On the subjective criterion—which 'turns on an official's knowledge and good faith belief'—summary action may be more difficult. Questions of intent and subjective attitude frequently cannot be resolved without direct testimony of those involved." *Id.* at 1209 (quoting *Apton v. Wilson*, 506 F.2d 83 (D.C. Cir. 1974)) (footnote omitted).

109. 102 S. Ct. 2727 (1982). *Fitzgerald* had also sued White House aides Bryce Harlow and Alexander Butterfield, claiming that they were part of the same conspiracy alleged in the claim against Nixon. Harlow and Butterfield were also appealing from the district court's refusal to grant summary judgment.

110. *See id.* at 2738.

111. "We therefore hold that government officials performing discretionary func-

Harlow court would refuse to allow discovery until the threshold question of immunity was resolved.¹¹² These changes certainly reduce the risk of intrusiveness and, therefore, also reduce the force of the argument favoring absolute immunity for the President deriving from his "unique position."

The Court's second argument supporting absolute immunity for the President was a claim that such immunity is required by consideration of constitutionally mandated separation of powers.¹¹³ The Court readily admitted that the separation of powers does not immunize the President from all forms of judicial process.¹¹⁴ However, the Court applied a balancing test and concluded that a private suit for damages does not serve a sufficiently broad public interest to justify the exercise of jurisdiction.¹¹⁵ In concluding that private damages suits against the President are barred by the separation of powers, the Court not only ignored the possible public value of such suits,¹¹⁶ but also ignored its own decisions in previous cases. In *Butz v. Economou*,¹¹⁷ the Court concluded that members of the President's cabinet were entitled to only qualified immunity. Separation of powers evidently did not require a contrary finding. The holding of *Butz v. Economou* was subsequently affirmed in *Harlow v. Fitzgerald*,¹¹⁸ the companion case of *Nixon v. Fitzgerald*. *Harlow* further extended the rule of *Butz* to include top personal aides to the President.¹¹⁹ Once again that decision was not precluded by considerations of separation of powers. It certainly seems anomalous to say that the President's closest confidants and advisors may be held liable for engaging in a conspiracy while the President, allegedly a member of exactly the same conspiracy, cannot be held accountable in a damages action because to do so would violate the proper separation of powers. Re-

tions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*

112. *Id.* at 2739. Justice Brennan's concurrence would allow for a limited form of discovery prior to the resolution of the immunity question. *Id.* at 2740 (Brennan, J., concurring).

113. See *supra* notes 85-91 and accompanying text. Chief Justice Burger issued a concurring opinion in which he emphasized his belief that Presidential immunity from civil damages was mandated by the Constitution. 102 S. Ct. at 2706.

114. See *supra* note 85 and accompanying text.

115. 102 S. Ct. at 2704. See also *supra* notes 88-91 and accompanying text.

116. "In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees." *Butz v. Economou*, 438 U.S. at 506.

117. 438 U.S. 478 (1978).

118. 102 S. Ct. at 2734. Justice Powell wrote the decision in both *Nixon* and *Harlow*.

119. *Id.*

alistically, it would seem that a suit against a President's closest confidants would be at least as intrusive as a suit against the President himself.¹²⁰ Considering the Court's decisions in *Harlow* and in *Butz*, it is difficult to accept the Court's separation of powers arguments.

The Court's final argument¹²¹ was that Presidential damages liability was not required because sufficient alternative means were available to protect against Presidential misconduct.¹²² While that statement may very well be true, a plaintiff such as Fitzgerald, who had allegedly been wronged by an action of the President, would be without a remedy against the person responsible for that wrong.¹²³ The right of an individual to claim the protection of the laws is not a right which should be discarded without strong justification.¹²⁴ The justification presented by the Court does not appear to be sufficient to support such a denial.

IV. CONCLUSION

The Supreme Court's decision in *Nixon v. Fitzgerald*, granting absolute immunity from civil damages liability to the President for any acts within the outer perimeter of his authority, is a rather difficult decision to justify. Certainly the arguments marshaled by the Court are not so compelling as to justify the departure from the precedent of *Butz v. Economou* holding other federal executive officers to be entitled to only a qualified immunity. The decision is also a little frightening in that the President now would be immune from suit no matter how outrageously his conduct offends the laws

120. The Court did not decide whether the President could be compelled to produce evidence in the trial of his top aides and alleged co-conspirators. If he could be so compelled, then the supposed protections afforded by the separation of powers seemingly vanish. If he could not be compelled to give evidence, it would seem that his aides' defense efforts might be unfairly compromised.

121. As an additional argument, Justice Powell presented some historical evidence supporting the claim that the Framers of the Constitution assumed the President to be immune from liability for damages. 102 S. Ct. at 2702 n.31. This evidence was refuted by Justice White in his dissent. *Id.* at 2713-17. None of the historical evidence is compelling and will not be given further consideration in this Note.

122. *Id.* at 2706. See *supra* notes 92-99 and accompanying text.

123. Chief Justice Burger's concurrence emphasized that Fitzgerald had already received substantial relief through the Civil Service Commission. See *supra* note 62 and accompanying text. He concluded from this that "similarly situated persons are therefore not without an adequate remedy." 102 S. Ct. at 2708 n.5 (Burger, C.J., concurring). Of course, not all possible plaintiffs would have such an available remedy.

124. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). "The 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." *Id.* at 163.

and the Constitution of this nation.¹²⁵ Fortunately, the Court's holding is very narrow and is unlikely to have much impact aside from its bar against suits for damages against the President.¹²⁶ The real danger in the Court's decision is the attitude toward the Presidency which it indicates. The majority seems to have lost sight of the meaning of the famous dictum in *United States v. Lee*.¹²⁷ If the President of the United States may violate certain laws with absolute immunity from subsequent liability, may it truly be said in this country that "no man is above the law."

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125. 102 S. Ct. at 2710 (White, J., dissenting).

126. The holding of the Court is specifically limited to damage liability. *See id.* at 2701. Thus, this decision should have no impact on suits seeking injunctive relief. *See id.* at 2704. Any argument that this case somehow overrules or weakens the decision of *Butz v. Economou* limiting immunity for federal executives other than the President is destroyed by the reaffirmance of the holding of *Butz* in the companion case of *Harlow v. Fitzgerald*, 102 S. Ct. at 2734.

127. 106 U.S. 196, 220 (1882). *See supra* note 1 and accompanying text.

