Nixon v. Fitzgerald: Presidential Immunity as a Constitutional Imperative

Theodore P. Stein
Government officials have long enjoyed some degree of immunity from civil suits for damages. Rooted in English common law, immunity shields officials from civil liability for official actions that are discretionary and within the scope of their authority.

1. See generally Freed, Executive Official Immunity for Constitutional Violations: An Analysis and a Critique, 72 Nw. U.L. Rev. 526 (1977). This Note will discuss the personal liability of officials to causes of action for monetary damages. The doctrine of immunity does not bar other forms of relief. For example, courts have consistently allowed plaintiffs injunctive relief to forestall ongoing constitutional violations by officials. Id.

2. The common-law roots of judicial immunity can be traced to the maxim, “the King can do no wrong.” See Gray, Private Wrongs of Public Servants, 47 CAL. L. Rev. 303, 311 (1959). Because judges were empowered by the King to dispense justice, the King alone could discipline them. In short, judges possessed absolute immunity. Id. Immunity for legislators grew out of struggles between the King and Parliament. Members of Parliament sought to protect their independence from criminal prosecutions by the King. Freed, supra note 1, at 528 n.14. These struggles culminated in passage of the Bill of Rights of 1689, which provided speech and debate immunity. 1 W. & M., Sess. 2, ch. 2 (1689). This provision later served as a model for the Constitution's speech and debate clause. U.S. Const. art. I, § 6, cl. 1. Less certain in English common law was the immunity accorded executive branch officers. See Freed, supra note 1, at 528. After 1750, policemen were liable only if they did not act in good faith. See Gray, supra, at 318. The defense of good faith also appears to have been available to at least some other executive branch officials. See Scheuer v. Rhodes, 416 U.S. 232, 239 n.4 (1974); Freed, supra note 1, at 528.

3. Historically, officials who performed ministerial duties could not avoid liability when they erred or refused to act. Freed, supra note 1, at 531 n.28. Prior to Scheuer v. Rhodes, 416 U.S. 232 (1974) and Butz v. Economou, 438 U.S. 478 (1978), officials were immune from liability when exercising discretion. See generally Barr v. Matteo, 360 U.S. 564, 573-75 (1959) (plurality opinion); Spalding v. Vilas, 161 U.S. 483, 498-99 (1896). Scheuer and Economou eliminated the distinction between “ministerial” and “discretionary” at least for suits alleging constitutional violations.

4. As a predicate for extending immunity, courts have consistently required that an official's acts fall within the scope of his statutory and constitutional authority. See, e.g., Scheuer, 416 U.S. at 247 (“[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office . . . .”); Barr v. Matteo, 360 U.S. at 575 (plurality opinion) (“The fact that the action here taken was within the outer perimeter of [the official's] line of duty is enough to render the [immunity] privilege applicable . . . .”). The Supreme Court has given broad meaning to the term “scope of authority.” For example, the Court has refused to place unlawful official behavior, which by its nature is unauthorized, outside the scope of official authority. Rather, behavior falls within the scope of authority if its purpose was generally authorized by statute or the Constitution. Matteo, 360 U.S. at 572 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)). An official’s “scope of au-
Historically, courts have justified granting official immunity on policy grounds. First, courts have concluded that it would be unjust to subject to liability officials who are required by law to exercise discretion.\(^5\) Second, courts have reasoned that the threat of civil liability would deter officials from acting decisively.\(^6\) Third, it is feared that without immunity officials would devote considerable time and resources to defending civil suits at the public's expense.\(^7\)

The Supreme Court has recognized two types of official immunity—absolute\(^8\) and qualified.\(^9\) Absolute immunity operates as a complete bar to relief, regardless of an official's motive for taking a challenged action.\(^10\) Qualified immunity offers more limited protection. To obtain qualified immunity, officials must first demonstrate that they acted without malice and in the reasonable belief that their conduct was legal.\(^11\) The presence of either bad faith or knowledge of wrongdoing bars an official from raising the defense of qualified immunity. Once granted, however, qualified immunity, like absolute immunity, precludes a plaintiff's recovery.

At common law, courts consistently granted absolute immunity to judges, legislators, and executive branch officials.\(^12\) The immunity afforded executive officials, however, underwent a major transformation in

---

5. See Scheuer, 416 U.S. at 239-40; Matteo, 360 U.S. at 570; Spalding, 161 U.S. at 498-99.
6. See Scheuer, 416 U.S. at 240; Matteo, 360 U.S. at 571; Spalding, 161 U.S. at 498-99. See also Gregoire v. Biddle, 177 F.2d at 581 ("[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 but the most resolute, or the most irresponsible in the unflinching discharge of their duties.").
7. See Matteo, 360 U.S. at 571. See also Freed, supra note 1, at 529-30.
10. Economou, 438 U.S. at 508-11; accord Imbler, 424 U.S. at 422; Matteo, 360 U.S. at 575.
12. Legislative immunity arises out of the Constitution's speech and debate clause, U.S. Const. art. I, § 6, cl. 1. The immunity afforded judges and executive branch officers is a common law invention. See supra note 2 and accompanying text.
the mid-1970's. At that time, the Supreme Court held that executive officials normally were entitled only to qualified immunity from civil suit. In addition, the Court dramatically altered its analysis of the immunity issue. The Court decided to premise absolute immunity on an official's function, rather than his office. The Court held that officials would be absolutely immune whenever they functioned in a judicial or legislative capacity. An executive branch official, such as a prosecutor or administrative law judge, also would be entitled to absolute immunity when performing a quasi-judicial responsibility. But absent a showing that an absolute exemption from liability was required by public policy, an official who did not perform legislative or judicial tasks might only claim qualified immunity. The Court characterized this analysis as a functional approach.

In granting qualified immunity to federal executive officials, the Supreme Court had hinted that such limited protection would be the rule, regardless of the official's rank. In *Nixon v. Fitzgerald*, the Court specifically confronted the question of presidential immunity.

In 1970, the United States Air Force fired A. Ernest Fitzgerald, a weapons analyst, shortly after he disclosed to Congress the existence of massive defense department cost-overruns. Eight years later, Fitzgerald filed a complaint in the United States District Court for the District of Columbia against former President Richard M. Nixon and ex-White House aides Bryce Harlow and Alexander Butterfield. Fitzgerald sought damages relief against the three defendants, alleging that he was fired in retaliation for his congressional testimony. Nixon, Harlow, and Butterfield moved for summary judgment, arguing that they were entitled to absolute immunity from suit. The district court denied the motion for summary judgment, reasoning that President Nixon and his aides were entitled only to qualified immunity.
Nixon, Harlow, and Butterfield filed an interlocutory appeal with the United States Court of Appeals for the District of Columbia Circuit. The court dismissed the appeal summarily for lack of jurisdiction. On appeal, the Supreme Court, in a five-to-four decision, held that President Nixon was entitled to absolute immunity for all acts performed within the "outer perimeter" of his authority. The Court reasoned that absolute immunity was required by the separation of powers doctrine and was confirmed by public policy and constitutional history. In the companion decision of Harlow v. Fitzgerald, the Court recognized qualified immunity for Harlow and Butterfield.

This Note discusses the impact of Nixon v. Fitzgerald on the jurisprudence of official immunity and the doctrine of separation of powers. In describing immunity law, it traces the evolution of the Supreme Court's functional approach to absolute immunity and the emergence in the mid-1970's of qualified immunity as the usual protection afforded public officials. This Note concludes that the extension of absolute immunity to the President is inconsistent with the functional approach taken by the Court and not justified on the basis of either public policy or the separation of powers doctrine. It argues that the new objective standard for qualified immunity enunciated in Harlow is sufficient to protect the President and other public officials from frivolous lawsuits.

I. THE HISTORICAL ROOTS OF OFFICIAL IMMUNITY

In feudal England, official immunity was based on the tenet that the King can do no wrong. Gradually, however, policy reasons supplanted English political theory as the underlying common law justification for immunity. Although the notion that the King can do no wrong survives today in American jurisprudence in the doctrine of sovereign immunity, American courts have relied exclusively on public policy grounds for according immunity from civil liability to judges and executive branch for summary judgment). The three defendants also argued that the statute of limitations had run on Fitzgerald's claims but the court dismissed this claim. See Fitzgerald, No. 74-178 (D.D.C. Mar. 26, 1980) (memorandum regarding statute of limitations).

25. 102 S. Ct. at 2705.
27. This Note focuses on key Supreme Court decisions in the area of immunity law. Lower federal and state courts generally have followed the Court's lead in the area of public official immunity. See Kass, Damage Suits Against Public Officers, 129 U. PA. L. REV. 1110, 1119 & n.35 (1981).
28. See supra note 2 and accompanying text.
In 1871, the Supreme Court first addressed the policy reasons for official immunity when it reviewed a civil claim filed against a judge in *Bradley v. Fisher*.

In *Bradley*, a trial judge had disbarred the attorney who represented an alleged conspirator in the plot to assassinate President Lincoln. The attorney sought damages relief against the judge, alleging that the disbarment was malicious. The Supreme Court held that the judge was absolutely immune from civil suit for his judicial acts.

Drawing on English common law, the Court reasoned that absolute immunity was needed to safeguard judicial independence. The strong passions engendered by litigation could spur a losing party to allege malice on the part of the judge. Sincere judges would be subjected to "vexatious actions." The Court noted, moreover, that the remedy of impeachment was available against judges who acted maliciously.

Twenty-five years after *Bradley*, the Supreme Court applied the same policy analysis in *Spalding v. Vilas* to extend absolute immunity to federal executive officers. In *Spalding*, the motives of an attorney who represented local postmasters in a salary dispute were impugned in a letter circulated by the United States Postmaster General. The attorney brought a defamation suit against the Postmaster General who at the time was a member of the President's cabinet. The Court held that even if he had acted with malice, the Postmaster General was absolutely immune from civil suit for discretionary acts within the scope of his authority.

The Court reasoned that the same policy considerations enunciated in *Bradley* supporting absolute immunity for judges should apply to executive officials. The Court determined that civil liability would "seriously

---

29. *See Freed, supra* note 1, at 529.
30. 80 U.S. (13 Wall.) 335 (1871). Prior to *Bradley*, the Court considered the liability of federal officers to claims for damages arising from state law violations. For example, in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), the Court held the commander of an American warship liable in damages for seizing, without proper authority, a Danish ship on the high seas. The commander was held liable for trespass because the seizure in question had not been authorized by law. In *Kendall v. Stokes*, 44 U.S. (3 How.) 87 (1845), the Postmaster General was exempted from damages liability for mistakenly suspending payments to a creditor of the post office. The Court found that the Postmaster was authorized to suspend payments. These cases focused on whether a federal officer had exceeded his statutory authority and held that an official should be liable in damages for actions taken outside the scope of authority. The Court, however, did not address the underlying policy reasons for exempting federal officers from liability for state law offenses.
31. 80 U.S. at 354.
32. *Id.* at 347.
33. *Id.* at 349.
34. 161 U.S. 483 (1896).
35. *Id.* at 498-99.
cripple the proper . . . administration of public affairs” by the executive branch, and concluded that it would be unjust to subject an executive branch official to the constant dread that his motives might be challenged in court. The Court stressed, however, that to be immune from suit an official must act “more or less” within the scope of his official duties. After Spalding, federal courts extended absolute immunity to a wide range of federal executive officials, requiring only that the officials had exercised discretion within the scope of their official duties.

In Barr v. Matteo, a plurality of the Supreme Court held that absolute immunity was available to federal executive officials generally, not merely to executive officers of cabinet rank. In Matteo, two employees of the Federal Office of Rent Stabilization sued their superior for defamation. The suit was precipitated by the publication of a press release in which the superior promised to suspend the employees for promoting an unpopular budget plan. As in Spalding, a common law tort was the basis for the plaintiffs' suit for damages.

In holding that the defendant official was absolutely immune from civil suit for his discretionary acts within the “outer perimeter” of his authority, the Court echoed the policy grounds developed in Spalding. In addition, the Matteo Court added a third policy justification—that defending against civil suits would “consume time and energies which would otherwise be devoted to governmental service . . . .” The Court refused to consider the plaintiffs’ allegation that the defendant acted with malice. An inquiry into motive would defeat the privilege’s usefulness, the Court rea-

36. Id. at 498.
37. Id.
39. Freed, supra note 1, at 527.
40. 360 U.S. 564 (1959) (plurality opinion).
41. “The privilege is not a badge or emolument of exalted office, but an expression of policy designed to aid in the effective functioning of government.” Id. at 572-73.
42. Id. at 567 n.5.
43. Id. at 568.
44. See supra text accompanying notes 36-37.
45. 360 U.S. at 571.
soned, because it would subject an official to a costly trial on the strength of an allegation of bad faith.46

II. THE EVOLUTION OF THE QUALIFIED IMMUNITY STANDARD

In *Scheuer v. Rhodes*,47 the Court confronted the question of immunity for officials who had not been accorded immunity at common law. In *Scheuer*, the personal representatives of four students killed at Kent State University in 1970 sought damages, for violation of the students' civil rights under 42 U.S.C. § 1983,48 from the governor of Ohio, officials of the state's national guard, and the president of the state-funded university.49 Although the Court ultimately granted the officials qualified immunity, it examined the effect its decision would have on the underlying purpose of section 1983. The Court observed that the provision's purpose was to provide relief to parties deprived of their constitutional rights by state officials.50 The law would be "drained of meaning" if state officials, the primary targets of section 1983 protection, were given absolute immunity.51 Yet the Court found that some form of immunity was justified. Because governors and national guard officers must act "swiftly and firmly,"52 personal liability might deter decisive official action. Reiterating the policy grounds cited in *Bradley* and *Spalding*, the Court reasoned that it would be unfair to hold executive officials liable for good faith acts when they were legally obligated to act. Therefore, the state officials in *Scheuer* should receive qualified immunity coterminous with the scope of their dis-

---

46. Id. at 575 (quoting *Brandhove*, 341 U.S. at 377 (1951)).
   
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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.
49. *Scheuer*, 416 U.S. at 234. Prior to *Scheuer*, the Supreme Court had held judges and legislators absolutely immune from § 1983 liability. *Pierson v. Ray*, 386 U.S. 547 (1967) (judges); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (legislators). The Court found that the policy reasons underlying immunity from common-law torts applied to § 1983 claims with equal force. For example, in *Pierson*, the Court concluded that allowing § 1983 claims to be prosecuted against judges would inhibit "principled and fearless decisionmaking." 386 U.S. at 553-55. In light of the compelling reasons for immunity, the Court decided that Congress, in passing § 1983, would not have repealed the existing common-law immunity of legislators and judges without including express language to carry out the repeal. *See Pierson*, 386 U.S. at 554-55; *Brandhove*, 341 U.S. at 376.
51. Id. at 248.
52. Id. at 246.
cretionary responsibilities.\textsuperscript{53}

The qualified immunity standard the Court adopted in \textit{Scheuer} was clarified in \textit{Wood v. Strickland}.\textsuperscript{54} In \textit{Strickland}, the Court upheld qualified immunity for school board members against a section 1983 action brought by two students who had been expelled from school.\textsuperscript{55} The \textit{Strickland} Court found that the qualified immunity standard comprised subjective and objective components. The subjective component required a court to determine if an official had acted with malice. The objective component demanded that a court decide whether the official knew or should reasonably have known that his acts were illegal. The Court held that the presence of malice or knowledge of wrongdoing would defeat the claim of qualified immunity.

In \textit{Harlow v. Fitzgerald},\textsuperscript{56} the Supreme Court broke new ground by altering the qualified immunity standard articulated in \textit{Strickland}. The Court eliminated the subjective component of the standard, making consideration of motive irrelevant.\textsuperscript{57} The subjective component had made it difficult to dismiss frivolous lawsuits against government officials. All too often, the Court observed, the subjective element of motive had been viewed as a genuine issue of fact requiring resolution at trial.\textsuperscript{58} Additionally, an inquiry into potential malice sanctioned intrusive discovery aimed at pinpointing an official's state of mind.

Instead, the Court announced a two-step analysis to determine whether a court should grant qualified immunity. First, as a threshold matter, a court must determine if the statutory or constitutional right asserted by the plaintiff was clear at the time of the alleged wrongful action. Second, it must determine whether the official should reasonably have known the action was contrary to law.\textsuperscript{59} Generally, if the law was unambiguous, an official would face a rebuttable presumption that he knew the state of the law at the time he acted.

In \textit{Harlow}, the Court noted that, normally, executive branch officials could only expect to receive qualified immunity from civil suits for dam-

\textsuperscript{53} \textit{Id.} at 247.
\textsuperscript{54} 420 U.S. 308 (1975).
\textsuperscript{55} \textit{Id.} at 310.
\textsuperscript{56} 102 S. Ct. 2727 (1982).
\textsuperscript{57} \textit{Id.} at 2738.
\textsuperscript{58} The subjective element of the good faith defense has proved incompatible with our admonition in \textit{Economou} that insubstantial claims should not proceed to trial. . . . [A]n official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury. \textit{Id.} at 2737-38.
\textsuperscript{59} \textit{Id.} at 2739.
The Court reaffirmed its view—adopted in the mid-1970's—that officials could obtain absolute immunity if they could demonstrate that the public's interest required a blanket exemption. That determination required a court to perform a functional analysis.

III. THE FUNCTIONAL APPROACH TO ABSOLUTE IMMUNITY: IMBLER AND ECONOMOU

With Imbler v. Pachman, the Supreme Court began to reshape its approach to the jurisprudence of absolute immunity. In Imbler, the Court granted absolute immunity on the basis of function rather than office, deviating from the analysis in Spalding and Matteo. Consequently, executive officials would not automatically be granted absolute immunity. Instead, a blanket exemption from civil liability would only be allowed when public policy required it.

In Imbler, the Supreme Court reviewed a section 1983 action filed against a prosecutor. The Court held that prosecutors were absolutely immune under the common law for the same policy reasons that it had identified in Bradley to justify absolute immunity for judges. Personal liability would divert a prosecutor's energies from public duties to defending civil suits—at the public's expense. Liability also would preclude vigorous performance by a prosecutor of his official responsibilities.

While the Bradley Court limited its holding to judges, the Imbler Court asserted that function rather than office would be the touchstone for granting absolute immunity in the future. A prosecutor would be covered because he performed a "quasi-judicial" function. Like a judge, a prosecutor would frequently be the target of civil suits because "a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions . . . ." The Court stressed that protections other than relief in damages were available to an aggrieved party, ranging from the remedial powers of the trial judge and appellate review to criminal penalties against the prosecutor. Additionally, the Court narrowed the reach of absolute immunity to those activities arising from a prosecutor's quasi-judicial functions. In dicta, the Court indicated that a prosecu-

---

60. Id. at 2733; accord Economou, 438 U.S. at 508.
61. 102 S. Ct. at 2733.
63. Id. at 422-23.
64. Id. at 423-24 (quoting Pearson v. Reed, 6 Cal. App. 2d 277, 287, 44 P.2d 592, 597 (1935)).
65. 424 U.S. at 425.
66. Id. at 427.
tor would not receive absolute immunity when he acted in an administrative or investigative capacity.67

The holding of Imbler was limited to section 1983 claims against state officials for constitutional violations. In Butz v. Economou,68 the Supreme Court considered the immunity available to officials in defending a suit brought against federal officials for constitutional violations.69 In Economou, a disgruntled commodities trader sued the United States Secretary of Agriculture and several Department of Agriculture officials for initiating unauthorized departmental proceedings against him.70 The commodities trader sued for damages directly under the Constitution,71 alleging various infractions of his rights.

In determining what type of immunity should be accorded the Secretary, the Court first distinguished Spalding and Matteo, two cases which appeared to hold that an executive branch official was absolutely immune for any actions taken within the outer perimeter72 of his official duties.73 The Court found that neither case had reached the question of the potential liability of officials who had exceeded their constitutional authority.74

67. “We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate.” Id. at 430-31 (footnote omitted).
69. The Supreme Court earlier had recognized a private cause of action for damages arising directly under the Constitution in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). In Bivens, the plaintiff claimed that his fourth amendment rights were violated when federal agents arrested him and searched his home without a warrant. The Court observed that the “very essence of civil liability,” id. at 397 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)), was the right to claim protection under the law, and that damages were the “ordinary remedy for an invasion of personal interests in liberty.” 403 U.S. at 395 (citations omitted): The Court stopped short, however, of deciding a key issue raised by its recognition of a private remedy for unconstitutional behavior—namely, the liability of the federal agents to civil suit. (The Court stated that it had not addressed the immunity issue because the appeals court below had not considered it.) On remand, the Second Circuit held that the agents were eligible only for qualified immunity. Most other circuits followed the Second Circuit’s lead. See, e.g., G.M. Leasing Corp. v. United States, 560 F.2d 1011 (10th Cir.), cert. denied, 435 U.S. 923 (1977); Jones v. United States, 536 F.2d 269 (8th Cir. 1976), cert. denied, 429 U.S. 1039 (1977); Weir v. Muller, 527 F.2d 872 (5th Cir. 1976); Paton v. La Prade, 524 F.2d 862 (3d Cir. 1975); Mark v. Groff, 521 F.2d 1376 (9th Cir. 1975); Brubaker v. King, 505 F.2d 534 (7th Cir. 1974); Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974); States Marine Lines, Inc. v. Shultz, 498 F.2d 1146 (4th Cir. 1974).
70. 438 U.S. at 481.
71. Economou brought his action pursuant to Bivens. See supra note 69.
72. See Matteo, 360 U.S. at 575. (“The fact that the action here taken was within the outer perimeter of petitioner’s line of duty is enough to render the privilege applicable . . .”).
73. See supra note 4 and accompanying text.
74. Economou, 438 U.S. at 495.
Presidential Immunity

Just as *Scheuer* had considered the impact of immunity on section 1983 actions, the *Economou* Court looked to the effect of immunity on the ability of parties to sue for damages directly under the Constitution. Absolute immunity, the Court concluded, would “drain” such a remedy of substance.\(^75\) In addition, such a blanket exemption would violate the principle that no individual is above the law.\(^76\) Moreover, the Court reasoned that it would be anomalous to grant federal officials more protection for their unconstitutional behavior than it had accorded state officials in *Scheuer*.\(^77\) Therefore, the Court concluded that a cabinet officer was protected only by qualified immunity.\(^78\)

Turning to the allegations against the agency attorney and the hearing examiner (now called an administrative law judge), the Court recognized, as it had in *Imbler*, that an official might qualify for absolute protection if he could demonstrate that he performed “special functions” that were “essential to the conduct of the public’s business.”\(^79\) The Court held that both officials were entitled to absolute immunity for their official acts. First, the Court noted that agency attorneys and administrative law judges perform a “quasi-judicial” function in administrative adjudications, acting as prosecutor and judge respectively. Second, both types of officials were likely to be targets of frequent civil suits by losing parties. Third, the Court observed that, as in the judicial setting, the adjudicative process afforded a party various safeguards to prevent or remedy arbitrary actions taken by official participants.\(^80\) The Court was concerned with keeping frivolous claims out of court and encouraged courts to dismiss such claims quickly.\(^81\)

Following *Economou*, the United States Court of Appeals for the District of Columbia Circuit, in *Halperin v. Kissinger*,\(^82\) applied the functional analysis to determine whether a President was entitled to absolute immunity. Former National Security Advisor Morton Halperin had sued President Nixon and other executive branch officials for illegal wiretapping. Applying the functional approach articulated in *Economou*, the court of appeals held that the former President was entitled only to qualified imm-

---

75. *Id.* at 501.
76. *Id.* at 506.
77. In *Harlow*, the Court made the same argument in extending qualified immunity to White House aides. 102 S. Ct. at 2734.
79. *Id.*
80. *Id.* at 511-17.
81. *Id.* at 507-08.
82. 606 F.2d 1192 (D.C. Cir. 1979), *aff’d per curiam in part by an equally divided court, cert. dismissed in part*, 452 U.S. 713 (1981).
munity from the claim. 83

The District of Columbia Circuit rejected the contention that the President should receive absolute immunity because of his unique status. The court concluded that absolute immunity was not justified on public policy grounds. 84 Moreover, limited liability was intended to check executive behavior that threatened constitutional rights and would not hamper effective government. A serious commitment to the remedy fashioned in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* 85 required that high-level officials, not just their subordinates, be subject to suit. This was required by the principle of equal justice under law. 86 The court also noted that the protection offered by qualified immunity took into account the special time demands made on a President. 87

The *Halperin* court also recognized that public policy arguments alone could not dispose of the question of presidential immunity. The District of Columbia Circuit concluded that presidential immunity had a constitutional facet, a facet not fully present when suits were brought against other federal officials. 88 In short, a civil suit against the President required the judiciary to consider whether such an assertion of court jurisdiction would be permitted by the separation of powers doctrine. 89

IV. THE SEPARATION OF POWERS DOCTRINE

While the separation of powers doctrine is central to the constitutional design of the federal government, it defies strict legal definition. Actually, it is a political theory rather than a technical rule of law. 90 The separation

---

83. *Id.* at 1213.
84. *Id.* at 1212-13.
86. The appeals court noted that election to office is not meant to exempt officials from application of the laws: “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 least, are creatures of the law, and are bound to obey it.” *Halperin*, 606 F.2d at 1213 (quoting United States v. Lee, 106 U.S. 196, 220 (1882)). See *Economou*, 438 U.S. at 506.
87. *Halperin*, 606 F.2d at 1212-13. A President would be entitled to “consult fewer sources and expend less effort inquiring into the circumstances of a localized problem” particularly in an emergency. This would make it extremely difficult for a plaintiff to defeat a President’s good faith immunity. *Id.* (quoting Apton v. Wilson, 506 F.2d 83, 93 (D.C. Cir. 1974)).
88. See *Harlow*, 102 S. Ct. at 2735 n.17 (“Suits against other officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself.”).
89. The court of appeals held that the separation of powers doctrine did not require absolute presidential immunity. See infra note 108.
90. See Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts*
of powers doctrine requires that federal power be dispersed in independent, coordinate branches of government. In this way, power cannot be concentrated in a single, tyrannical branch. Although the legislative, judicial, and executive branches are independent, their functions overlap, providing a series of checks and balances which ensure that the integrity of each branch is preserved.91

Beginning with United States v. Burr92 and continuing in a series of decisions that tested a President’s executive privilege to withhold information, the Court examined the extent to which the separation of powers principle affected a President’s immunity from judicial process. In Burr, Chief Justice Marshall authorized the issuance of a subpoena duces tecum to President Jefferson to produce a private letter thought relevant to Aaron Burr’s defense against a treason charge.93 President Jefferson claimed executive privilege and refused to release the letter. Invoking Marbury v.

in “Inferior” Federal Courts—A Study in Separation of Powers, 37 HARV. L. REV. 1010, 1012-16 (1924). “In a word, we are dealing with what Sir Henry Maine, following Madison, calls a ‘political doctrine,’ and not a technical rule of law. Nor has it been treated by the Supreme Court as a technical legal doctrine.” Id. at 1014.

91. The Supreme Court consistently has used the separation of powers doctrine to validate its claim to judicial review power. That power enables the Court to determine whether executive actions and congressional enactments are constitutional. In Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the Court asserted the power of judicial review for the first time. Speaking through Chief Justice Marshall, the Court held that judicial review was essential to the independent role for the judiciary charted by the Constitution. The Court stated that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” Id. at 177.

One hundred and fifty years later, in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), the Supreme Court found that judicial review was required by the overlaps between federal departments envisioned by the Constitution. In Youngstown, the Supreme Court held that President Truman exceeded his constitutional and statutory authority when he ordered seizure of the nation’s steel mills to avert a nationwide strike. The Court noted that its power to review presidential orders was inherent in the federal government’s constitutional design. As Justice Jackson pointed out in his historic concurrence: “While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.” Id. at 635 (Jackson, J., concurring). Accord Nixon v. Administrator of General Services, 433 U.S. 425, 442-43 (1977); United States v. Nixon, 418 U.S. 683, 708 (1974); Halperin, 606 F.2d at 1211-12 & 1212 n.136.

The Court has consistently rejected the “archaic” view that separation of powers means complete independence for each governmental branch. Administrator of General Services, 433 U.S. at 443. In doing so, the Court early on adopted the conception of the separation of powers doctrine provided by James Madison in Federalist No. 47. THE FEDERALIST No. 47 (J. Madison). For further discussion of the conflicting views of separation of powers, see Youngstown, 343 U.S. at 634-35 and 635 n.1 (Jackson, J., concurring).


93. Id. at 34-35.
Madison's authority to decide what the law is, Chief Justice Marshall ruled that ultimately the courts must decide whether an assertion of executive privilege is valid, although due deference must be accorded to the President. Here, he found that a blanket privilege was not justified. The privilege to withhold the letter would only exist if disclosure threatened the "public safety." In the Watergate tapes case, United States v. Nixon, the Court again looked at an assertion of executive privilege in the context of criminal proceedings. It upheld the issuance of a subpoena duces tecum by Watergate Special Prosecutor Leon Jaworski to compel in camera disclosure of taped White House conversations. Jaworski sought the materials in connection with the criminal prosecutions of Attorney General John Mitchell and various White House aides. President Nixon opposed releasing the tapes on two grounds: first, he asserted that the separation of powers doctrine barred release, and second, he argued that even if release was constitutional it should not be ordered because of the important need to safeguard White House deliberations from disclosure.

The Court reaffirmed its responsibility under the Constitution to determine if an executive action was constitutional. The Court concluded that "without more" neither the separation of powers doctrine nor the public's interest in preserving the confidentiality of presidential communications could justify "an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."

The Court used a balancing test to weigh the President's interest in confidentiality against the judiciary's article III responsibility under the Constitution to ensure fairness in the criminal justice system. On the one hand, the Court found that effective presidential decisionmaking required the free exchange of ideas between a President and his aides. A breach in confidentiality could inhibit this exchange. The Court found, moreover, that the privilege is inherent in the separation of powers doctrine because confidentiality is essential to an effective Presidency. Weighing against the exercise of the privilege, however, was the judiciary's own constitu-

94. *See id.* at 34 ("The propriety of introducing any paper into a case as testimony, must depend on the character of the paper, not on the character of the person who holds it.").
95. *Id.* at 37.
97. *Id.* at 703.
98. *Id.* at 703-05. Specifically, the Court invoked Marbury v. Madison and Burr as authority for its power of judicial review. *See supra* notes 91-95 and accompanying text.
99. 418 U.S. at 706.
100. *Id.* at 711-12.
101. *Id.* at 711-13.
tional function—also protected by the separation of powers doctrine—of ensuring justice in criminal prosecutions. An absolute privilege would seriously impair the judiciary's basic function under article III and undermine the principles of "dispersed powers" and "workable government" inherent in the separation of powers doctrine.\textsuperscript{102} The Court concluded that the tapes must be released for in camera inspection. But it expressly reserved the question of whether executive privilege required presidential immunity from civil suit.\textsuperscript{103}

In \textit{Nixon v. Administrator of General Services},\textsuperscript{104} the Court examined President Nixon's claim of executive privilege in light of a specific statute requiring White House tapes and materials to be turned over to the executive branch for archival purposes. The Court examined whether the law's disclosure requirement violated the separation of powers doctrine,\textsuperscript{105} using a two-step analysis that further refined the balancing test adopted in \textit{United States v. Nixon}.\textsuperscript{106} First, a court must decide if one branch has disrupted a function assigned to another branch. Second, if a disruption has occurred, the court must balance the competing interests and decide if the intrusion reflects an "overriding need" to promote a constitutionally valid objective.

In this case, the Court found that the intrusion was not "unduly disruptive" because of several safeguards in the law. For example, the statute was administered by the General Services Administrator, a presidential appointee and member of the executive branch. Additionally, the Act expressly allowed the President to assert any privilege as to preserved materials. The Court also found, in the second step of its inquiry, that the statute promoted important public interests that were consistent with prior statutes.\textsuperscript{107}

Following \textit{Nixon v. Administrator of General Services}, several lower courts held that the separation of powers doctrine did not preclude a grant of qualified immunity to the President.\textsuperscript{108} These courts reasoned that the President, as a federal official, should be covered by the general rule of

\textsuperscript{102} Id. at 712. \textit{See supra} note 91.
\textsuperscript{103} 418 U.S. at 712 n.19.
\textsuperscript{104} 433 U.S. 425 (1977).
\textsuperscript{105} Id. at 441.
\textsuperscript{106} 418 U.S. at 711-12. \textit{See Note, supra} note 13, at 900-02.
\textsuperscript{107} 433 U.S. at 452-54.
\textsuperscript{108} \textit{See Halperin,} 606 F.2d at 1211-12 ("The doctrine of separation of powers wisely counsels the judiciary to act with care when reviewing the acts by other branches, but the courts may not evade their constitutional responsibility to delineate the obligations and powers of each branch"); \textit{see also Clark v. United States}, 481 F. Supp. 1086, 1090-91 (S.D.N.Y. 1979) (denial of President Nixon's motion to dismiss), \textit{appeal dismissed}, 624 F.2d 3 (2d Cir. 1980).
qualified immunity established by *Economou*. But the Supreme Court had not directly considered an absolute immunity claim by a President.

V. THE CASE FOR ABSOLUTE PRESIDENTIAL IMMUNITY

In January, 1970, A. Ernest Fitzgerald, a management analyst, lost his job with the Air Force.\(^{109}\) The dismissal came fourteen months after Fitzgerald testified before a joint congressional subcommittee that cost-overruns on the C-5A transport plane would reach $2 billion.\(^{110}\) Although the Air Force stated that Fitzgerald's dismissal was part of a departmental reorganization and reduction in force,\(^{111}\) Fitzgerald alleged that he had been the victim of unlawful retaliation because of his congressional testimony.\(^{112}\)

Fitzgerald filed suit in the United States District Court for the District of Columbia seeking damages from various White House and Department of Defense officials.\(^{113}\) The district court dismissed the suit, ruling that the statute of limitations had run. The United States Court of Appeals for the District of Columbia Circuit affirmed as to all defendants except White House aide Alexander Butterfield. In July 1978, Fitzgerald amended his complaint to include President Nixon,\(^{114}\) White House aide Bryce Harlow, and

---


\(^{110}\) Id. at 2694.

\(^{111}\) Id. at 2693.

\(^{112}\) Id. at 2695.

\(^{113}\) Id. at 2696. Prior to filing suit, Fitzgerald had sought relief from the United States Civil Service Commission. In September 1973, a hearing examiner for the Commission held that Fitzgerald's dismissal violated civil service regulations because it had been motivated by reasons "purely personal to" Fitzgerald. *Id.* at 2695-96. The examiner, however, found that the evidence did not support Fitzgerald's contention that he had been fired in retaliation for his testimony. The Commission recommended that Fitzgerald be assigned to his former position or one of comparable authority. *Id.* at 2696.

Prior to the ruling in *Nixon v. Fitzgerald*, Fitzgerald had been successful in obtaining significant relief. President Nixon agreed to pay Fitzgerald a settlement of $142,000. An additional $28,000 would have been paid to Fitzgerald if he had prevailed before the Supreme Court. Fitzgerald also received backpay and as of June 21, 1982, his former position with the Air Force. See *102 S. Ct.* at 2696 n.17, 2698-99.

\(^{114}\) According to the Court, President Nixon's involvement in the Fitzgerald dismissal, based on the record, was as follows: After being questioned about the Fitzgerald dismissal at a news conference in December 1969, President Nixon promised to look into the matter. He apparently made an effort to find another job for Fitzgerald within the Administration. At a second news conference in January 1973, President Nixon was again asked about Fitzgerald. At the news conference, President Nixon assumed personal responsibility for the firing. A day later, the White House retracted President Nixon's statement, claiming that the President had not been involved in the Fitzgerald firing but had confused Fitzgerald with another former civil servant. *102 S. Ct.* at 2694-95.
and other Nixon administration officials. By March 1980, only Nixon, Harlow, and Butterfield remained as defendants.

The defendants moved for summary judgment, claiming that they were absolutely immune from civil suit. The district court issued an order denying the motion, reasoning that, on the basis of Economou and Halperin, absolute immunity was not available. The district court found that Fitzgerald had five valid claims for damages against Nixon, Harlow, and Butterfield. Two claims arose under federal statutes designed to protect civil servants who cooperate in congressional investigations. A third damages claim, alleging violation of Fitzgerald's first amendment right to freedom of speech, arose directly under the Constitution.

The defendants then filed collateral appeals from the district court's order in the United States Court of Appeals for the District of Columbia Circuit. However, the District of Columbia Circuit dismissed summarily, apparently on the ground that it lacked proper jurisdiction over the subject matter of the appeal. The Supreme Court granted certiorari and, in a five-to-four decision, held that the President was absolutely immune from civil suit. Writing for the majority, Justice Powell found

115. Id. at 2697.
116. Id.; Harlow, 102 S. Ct. at 2732.
117. Fitzgerald v. Butterfield, No. 74-178 (D.D.C. Mar. 26, 1980) (order denying motion for summary judgment). The Court ruled that genuine issues of fact remained as to whether even qualified immunity should be granted the three defendants.
118. Two common law claims certified by the district court were subsequently dropped by Fitzgerald. 102 S. Ct. at 2697 n.20.
119. 5 U.S.C. § 7211 (1976 & Supp. V 1981) provides: "The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." 18 U.S.C. § 1505 makes it a criminal offense for anyone to obstruct a congressional investigation. The statute specifically covers any retaliatory actions aimed at witnesses who participate in a congressional or executive branch proceeding. A violation of 18 U.S.C. § 1505 (1976) is punishable by imprisonment for a maximum of five years and a maximum fine of $5,000. The district court ruled that Fitzgerald was entitled to infer a cause of action for damages under both statutes although neither law expressly conferred one. The validity of the inferred causes of action was not before the Supreme Court.
120. Nixon v. Fitzgerald, 102 S. Ct. at 2697 n.20.
121. In order to address President Nixon's appeal on the merits, the Supreme Court first held the district court's collateral order appealable under the doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Fitzgerald, 102 S. Ct. at 2698. Cohen sets forth criteria for determining when an interlocutory order is appealable. One of the criteria requires that the order present an unsettled question of law. The Court surmised that the District of Columbia Circuit had dismissed the appeal for lack of subject matter jurisdiction.
that the Constitution supported a grant of absolute immunity to the President. Noting that article II of the Constitution vested the federal government's executive power in the President, Justice Powell stressed that the President was entrusted with wide-ranging responsibilities "of utmost discretion and sensitivity." Since the President is unique among government officials, prior cases recognizing qualified immunity for governors and cabinet officers are inapposite on the issue of presidential immunity.

Moreover, a President's independence is protected by the separation of powers doctrine. The Court observed that the judiciary may assert jurisdiction over the President only when the purpose for extending such jurisdiction outweighs "the dangers of intruding on executive branch authority." Judicial action is permitted only when it promotes "broad public interests." As examples of justifiable intrusions the Court cited United States v. Nixon, where the judiciary had acted to safeguard fairness in criminal trials, and Youngstown, where the Court had acted to maintain the separation of powers balance. The Court concluded that Fitzgerald's "merely private suit for damages" did not warrant the exercise of jurisdiction over the President.

The Court then explored the public policy rationales it has historically used to justify grants of absolute immunity. According to the Court, a President's decisions were likely to arouse intense feelings. Because of his visibility, the President easily could become a target for civil suits. The Court observed that civil liability would divert presidential energies into defending suits, to the public's detriment. In addition, personal liability would undercut the public's interest in ensuring that the President carries out his duties fearlessly and impartially. Finally, the Court found confirmation for absolute presidential immunity in constitutional history.

The Court concluded that it was appropriate to recognize absolute immunity because it earlier had ruled in Halperin against absolute immunity for a President and his aides. The Supreme Court disagreed with the dismissal, pointing out that it previously had held that denials of absolute immunity were appealable under the Cohen criteria. See also Harlow, 102 S. Ct. at 2732 n.11.

---

124. 102 S. Ct. at 2702.
125. Id. at 2704.
126. Id.
127. Id. at 2703.
128. See id. at 2702 n.31. In a footnote, the Court stated that absolute presidential immunity should be inferred from the silence of the constitutional convention on the issue and that body's decision to specify impeachment as the appropriate remedy for official misconduct. The majority went on to quote Thomas Jefferson, Justice Story, and two delegates to the constitutional convention. But the Court also noted that historical materials on the framers' intent are "fragmentary" and, therefore, less compelling than the argument based on the separation of powers doctrine. Id.
nity for all acts within the "outer perimeter" of the President's official responsibilities,129 but reserved the question of whether Congress could impose liability by statute.130

In a concurring opinion, Chief Justice Burger disagreed with the majority's contention that Congress may still impose civil liability on the President. The Chief Justice underscored the fact that absolute immunity flowed from the separation of powers doctrine.131 Because absolute presidential immunity is "mandated" by the Constitution's separation of powers doctrine, Congress would be barred from legislating liability for the President. In addition, Chief Justice Burger argued that the need to prevent a "large scale invasion" of the executive branch by the judiciary far outweighed any need to vindicate private claims.132

Writing for the dissent,133 Justice White acknowledged the President's unique constitutional status, but argued that the need for a unique rule of immunity had not been demonstrated. In addition, the exemption conflicted with the principle underlying Bivens that injured parties are entitled to obtain damages in federal court for violations of their constitutional rights. According to the dissent, the remedial principle the Court has adhered to—that a wrongdoer normally should bear the costs of injury—should apply to the President unless governmental decisionmaking is undermined. Moreover, a blanket exemption would violate the longstanding principle of equal justice under law, reverting to the proposition that "the King can do no wrong."134

The dissent also disagreed with the majority's separation of powers analysis.135 Using the balancing test articulated in Nixon v. Administrator of General Services, the dissent would have focused the inquiry on whether jurisdiction would interfere impermissibly with one of the President's

129. The Court contended that immunity from civil suit would not place the President above the law because other remedies would be available to check a President's abuse of power. Id. at 2706. The majority stated that impeachment, scrutiny by the press and Congress, and the President's concern for his own stature were sufficient safeguards.
130. Id. at 2701 n.27.
131. Id. at 2707 (Burger, C.J., concurring) ("Absolute immunity for a President for acts within the official duties of the Chief Executive is either to be found in the constitutional separation of powers or it does not exist.").
132. According to Chief Justice Burger's research, only on two occasions has a private party sued a President for acts committed in office. Id. at 2706 n.1.
133. In a separate dissent, Justice Blackmun criticized the Court for stating on the one hand that Congress may subject a President to liability by statute and, on the other, that absolute immunity is compelled by the separation of powers doctrine. According to Justice Blackmun: "These two concepts . . . cannot coexist." Id. at 2727.
134. Id. at 2711 (White, J., dissenting). See supra note 2 and accompanying text.
135. Id. at 2710.
"constitutionally assigned functions."  The dissent concluded that the assertion of jurisdiction in this case did not interfere with a presidential function.  

Justice White also disputed the majority's view that civil liability against the President was barred by the separation of powers doctrine because it failed to serve "broad public interests." Instead, the dissent contended that such liability promotes the separation of powers doctrine because it furthers two important interests, the individual's right to legal redress and the enforcement of the rule of law. In addition, Justice White stated that the Court's view that liability is precluded by separation of powers principles "assumes that presidential functions are to be valued over congressional functions." Finally, the dissent found no support for absolute presidential liability in constitutional history.

Nor is the Court's holding justified on practical grounds, according to the dissent. In response to the contention that the President's visibility makes absolute immunity necessary, Justice White pointed out that suits against the President are quite rare. Even after Bivens in 1971, only a few suits have been filed against the President and they have been dealt with routinely by the Justice Department. In addition, the dissent observed that Harlow provided even more reason to believe that "frivolous claims will not intrude upon the President's time."

VI. NIXON v. FITZGERALD: A CONSTITUTIONAL APPROACH TO IMMUNITY

In Nixon v. Fitzgerald, the Supreme Court recognizes absolute presidential immunity as a constitutional imperative. In doing so, the Court departs from its traditional approaches to two areas of the law—official immunity and separation of powers.

Since its decisions in Imbler and Economou, the Court had adhered to a
functional analysis to determine the scope of official immunity. The functional approach dictated that absolute protection be granted only for sensitive governmental functions where an official can demonstrate that public policy requires it. In this way, the Court had sought to accommodate two competing interests: the injured party’s right to compensation for constitutional violations and the public’s right to effective government.

The Fitzgerald majority adopts a variation on this theme that is superficially appealing, but ultimately unconvincing. The majority observes that the President performs so many sensitive functions that determining which function gave rise to a particular activity would be “difficult” and would lead to an intrusive inquiry into presidential motives. Like the prosecutor and the judge, a President is likely to arouse intense feelings. Moreover, the majority argues that the President’s visibility would make him an easily identifiable target for lawsuits. Liability to suit could distract a President from his duties and inhibit fearless performance of official duties, to the public’s detriment.

Application of the functional approach to the facts of Fitzgerald, however, as the dissent notes, quickly dispels the notion that the functional analysis is too difficult to apply here. In Fitzgerald, the former President performed a personnel function pursuant to his legal authority to supervise the manner in which the Secretary of Defense conducts Air Force business. That function carries some of the indicia the Court used in Economou and Imbler to justify a blanket exemption from liability. Like a judge, for example, a President exercising his personnel authority could well engender hostility from disgruntled former employees and thereby subject himself to civil suit. Also, certain safeguards exist to rectify arbitrary actions that would tend to support a grant of absolute immunity for personnel functions.

That the balance may favor absolute immunity from suit in the personnel area, however, does not justify a blanket exemption from all civil

142. Id. at 2705.
143. Id.
144. See supra notes 79-81 and accompanying text.
145. The review provided Fitzgerald by the Civil Service Commission arguably afforded him a form of appellate relief and served as a check on official abuse of personnel power.
146. A persuasive case can be made that absolute immunity is not required for the President’s personnel activities. As the dissent points out, personnel powers are bounded by various statutes and civil service regulations, suggesting that the public interest requires more caution and less vigor on the part of officials, including the President. 102 S. Ct. at 2721-22 (White, J., dissenting). Impeachment and other broad societal remedies simply are not credible deterrents to unlawful official conduct. In addition, complete immunity for the President is unlikely to produce more uninhibited decisionmaking since subordinates make most personnel decisions without the President’s participation. Id. at 2726.
liability. The burden is on the President to demonstrate why such broad immunity is "essential for the conduct of the public business." Instead, a majority of the Court has shifted the focus from an inquiry based on function to one based on the office of the presidency itself. In doing so, the Court has abdicated its historic responsibility for deciding whether public ends would be served by a grant of immunity. Moreover, it has violated the longstanding principle of equal justice under law. That principle requires that the law treat each individual equally, without regard to the office held. An exemption for Presidential misconduct will undermine the public's faith in our political system's fairness.

The Fitzgerald Court also makes a disturbing detour from the separation of powers analysis established by prior case law. That analysis requires a court to balance the constitutional weight of the interest asserted against the dangers to governance posed by the intrusion. In Fitzgerald, the Court has abandoned its traditional approach in favor of an analysis weighted heavily in favor of presidential privilege. The majority concludes that jurisdiction may only be asserted over the Presidency if that assertion serves "broad public interests." Based on the examples provided by the Court, it appears that a suit may proceed only if the interest to be served involves the criminal justice system as in United States v. Nixon or implicates Congress's legislative prerogatives as in Youngstown. Such a difficult standard is unwarranted and is inconsistent with the balancing test the Court has used previously. In those cases, the Court has recognized that resolution of separation of powers questions requires full consideration of the interests of each of the branches involved.

147. Economou, 438 U.S. at 507.
148. Matteo, 360 U.S. at 572-73. See supra note 41 and accompanying text. See also Scheuer, 416 U.S. at 242.
149. See Marbury v. Madison, 5 U.S. (1 Cranch) at 163 ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."). See supra note 86.
150. See Fitzgerald, 102 S. Ct. at 2711 n.2 (White, J., dissenting) ("It is ironic that this decision should come out at the time of the tenth anniversary of the Watergate affair.").
152. It is unclear whether the statute involved in Nixon v. Administrator of General Services could pass muster on the basis of the separation of powers standard articulated in Fitzgerald. As in Fitzgerald, Administrator of General Services involved federal law, thereby implicating a congressional interest. Nixon v. Administrator of General Services, 433 U.S. at 443. See also Nixon v. Fitzgerald, 102 S. Ct. at 2717 (White, J., dissenting) (The judiciary's interest in Fitzgerald in vindicating constitutional rights was also implicated). In both cases, President Nixon asserted an absolute immunity from judicial process. The countervailing interest in Administrator of General Services was the public's right to preserve White
In *Fitzgerald*, the roles of both the judiciary and the Congress are implicated in the separation of powers question. The judiciary has an interest in vindicating the rights of private parties. In addition, the presence of Fitzgerald's statutory causes of action indicate that Congress has an interest in assuring a continuing flow of information to it. By ignoring the congressional interest, the Court appears to assume that "presidential functions are to be valued over congressional functions." The heavy emphasis on presidential prerogatives reflects a view of separation of powers that the Court, following the lead of the framers, has consistently rejected. Equally troubling is the Court's apparent failure to fulfill the Court's historic responsibility "to say what the law is." In the past, the Court has declined presidential invitations to extend an absolute privilege in a certain area in favor of a more flexible, case-by-case approach.

The advantages of the Court's conventional approach are apparent when that approach is applied to the facts of *Fitzgerald*. Applying the balancing test and assuming, as the majority asserts, personnel matters are a "constitutionally assigned" presidential function, allowing Fitzgerald's case to go forward arguably could be disruptive of that function. If so, it is not clear that Fitzgerald could justify the "intrusion" on the basis of an "overriding need" to promote the judicial objective of compensating in-

---

House tapes and papers for archival purposes. That interest is important. But, if the statute in *Administrator of General Services* does not violate the separation of powers doctrine, and there is no suggestion that the Court has overruled its decision, it is difficult to see how the public's interest in redressing violations of constitutional rights in *Fitzgerald* is any less "broad."

153. 102 S. Ct. at 2721 (White, J., dissenting).

154. *See The Federalist No. 47, at 302-03 (J. Madison) (New American Library ed. 1961)*. Additionally, constitutional history is inconclusive on the question of presidential immunity. The constitutional convention's silence provides little support for the proposition that the framers intended the President to be immune. *Accord Halperin*, 606 F.2d at 1211 (quoting Nixon v. Sirica, 487 F.2d 700, 711 (D.C. Cir. 1973) (en banc)). The *Fitzgerald* majority tacitly admits as much in its presentation of historical support. First, the Court has devoted only a footnote to its evidence. Second, the weight of that evidence is undercut by the Court's admission that it is "fragmentary." *See supra* note 128.

155. Compare Fitzgerald, 102 S. Ct. at 2707 (Burger, C.J., concurring) ("The essential purpose of the separation of powers is to allow for independent functioning of each co-equal branch of government...") with United States v. Nixon, 418 U.S. at 707 ("[T]he Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.") and *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.").


jured parties. Whether using conventional separation of powers analysis would have barred Fitzgerald's suit is beside the point. The point is that the Court could have limited its holding to the facts of Fitzgerald's case or even to the personnel function without precluding pending and future claims against a President that may be more meritorious.

The *Nixon v. Fitzgerald* decision, when viewed in light of prior case law, is a result-oriented opinion. The Court's hastiness to generate a rigid rule for the future appears to reflect its determination that President Nixon should not be liable in damages. Because Fitzgerald could have defeated former President Nixon's qualified immunity claim, the Court found it necessary to grant absolute immunity. The solution ordered by the Court, however, reaches far beyond the facts of "this merely private suit for damages." First, the Court's decision precludes all pending and future damage claims against an incumbent or former President for acts committed while in office, regardless of the circumstances. Second, by couching its holding in constitutional terms, the Court probably has preempted Congress from imposing civil liability on the President in the future.

158. Prior to the decision in *Fitzgerald*, President Nixon agreed to pay Fitzgerald a settlement of $142,000. Additionally, Fitzgerald had received back pay. As of June 21, 1982, moreover, the Air Force had agreed to reassign Fitzgerald to his former position. In short, Fitzgerald already appeared to have been compensated.

159. The foreclosure of more substantial claims is not simply hypothetical. See *Fitzgerald*, 102 S. Ct. at 2710 n.1. For example, the Court's absolute immunity rule appears to preclude monetary relief for Morton Halperin, the former National Security Council Advisor. Halperin alleged that former President Nixon ordered federal agents to wiretap his house without following appropriate statutory procedures. *Id.* at 2710.

160. Fitzgerald arguably could have made out a case sufficient to block qualified immunity for former President Nixon. Provided that Fitzgerald could show presidential involvement in his dismissal, see supra note 114, he need only demonstrate that President Nixon knew or should have reasonably known his actions were illegal. See supra text accompanying notes 56-59. If the law were clear at the time, President Nixon would have to rebut a presumption that he knew the law when he acted. Here, civil service regulations barred the use of a "reduction in force" to fire Fitzgerald. *Id.* at 2696 n.16. Therefore, President Nixon would have been presumed to know that his particular course of action was prohibited.

161. Although the Court appears to sanction congressional action imposing liability, a majority of the Court concludes that such action is barred by the Court's holding that absolute protection is mandated by the separation of powers doctrine. See 102 S. Ct. at 2712-13 (White, J., dissenting); *id.* at 2709 n.7 (Burger, C.J., concurring). It is difficult to see how passage of a new law authorizing damages relief against the President would stand on any firmer ground vis-a-vis the separation of powers doctrine than existing law. One of the statutes under which Fitzgerald brought his action, 5 U.S.C. § 7211 (1976 & Supp. V 1981), was specifically enacted as part of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 1217 (1978), to protect whistleblowers such as Fitzgerald from reprisals. See S. REP. NO. 969, 95th Cong., 2d Sess. 8, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 2723, 2730-31.
The abandonment of the functional approach simply is not warranted by public policy. As the majority itself observes, the historical record shows that lawsuits against the President have been few.\(^\text{162}\) The Court's modification of the qualified immunity standard in \textit{Harlow v. Fitzgerald} should facilitate the dismissal of frivolous suits. These suits are a legitimate concern because, while they ultimately may be unsuccessful, they drain the resources and energies of government officials and inhibit the vigorous performance of official duties. In \textit{Economou}, the Court stressed the need for prompt dismissal of frivolous suits.\(^\text{163}\) Lower federal courts have tried to follow the Supreme Court's lead and have been sensitive to the problem posed by frivolous claims against officials generally.\(^\text{164}\) The Court's goal, however, has been thwarted, at least in part, by the subjective component of the qualified immunity standard, which has often raised a genuine issue of material fact as to a defendant's state of mind and thus has prevented summary judgment.\(^\text{165}\)

Under the standard established by \textit{Harlow}, however, litigants will have a difficult time piercing the qualified immunity veil to sue the President.\(^\text{166}\)

\(^{162}\) 102 S. Ct. at 2703 n.33. Chief Justice Burger found only one instance, prior to \textit{Bivens}, in which a citizen sued a former President for acts committed during his tenure in office. \textit{Id.} at 2706 n.1 (Burger, C.J., concurring).

\(^{163}\) "Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss." \textit{Economou}, 438 U.S. at 507-08. \textit{See also} \textit{Harlow v. Fitzgerald}, 102 S. Ct. at 2733; \textit{Halperin v. Kissinger}, 606 F.2d at 1209 & n.116.

\(^{164}\) In \textit{Halperin}, the District of Columbia Circuit echoed the Supreme Court's admonition in \textit{Economou} that wherever possible, courts should resolve the immunity issue in favor of the official on summary judgment. 606 F.2d 1209-10. The Court stated that the "central problem" of the immunity doctrine is "[h]ow to make effective the use of summary procedures in preventing harassment of Executive officials." \textit{Id.} at 1210 n.121. The court stated that close control of discovery was essential to making official immunity meaningful. \textit{Id.} at 1209 n.120. It suggested that district courts, where disclosure by public officials is required, mandate that, where feasible, subordinate officials be deposed before high-level officials. \textit{Id. See also Sweeney v. Bond}, 669 F.2d 542, 546 (8th Cir. 1982) (deposition of governor barred by qualified immunity if specific need is absent); Harper v. Miller, 491 F. Supp. 217, 218 (D.D.C. 1980) (discussion of immunity question allowed by court in oral argument on unrelated issue to expedite prompt resolution of immunity issue).

\(^{165}\) The problem was discussed by the District of Columbia Circuit in \textit{Halperin}: This course [dismissal on summary judgment] is best suited for handling the objective basis for qualified immunity. Courts should be able to determine at the pretrial stage whether there is a genuine issue of material fact as to the reasonableness of a defendant's belief that he was acting legally. On the subjective criterion—which "turns on officials' 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. 606 F.2d at 1209 (citations omitted).

Like absolute immunity, qualified immunity would clothe the President with protection across the broad spectrum of his discretionary responsibilities. A plaintiff would have to overcome a plethora of practical difficulties in order to prosecute a suit against a President. For example, it is likely that an action against a President would be stayed until the President leaves office.

In addition, although a President would be expected to know the relevant law under the qualified immunity standard, he would be entitled "to consult fewer sources and expend less effort inquiring into the circumstances of a localized problem." Were a litigant able to puncture the President's immunity, he still might fail in his bid to obtain damages because of the wide range of executive branch acts carried out by subordinates. If not personally involved, a President would not be vicariously liable for the acts of his subordinates. Taken together, these factors explain why the District of Columbia Circuit in Halpern, prior even to the modification of the qualified immunity standard in Harlow, predicted that successful suits against the President would be "quite rare."

The President's unique constitutional status distinguishes him from any other executive branch official. Because the Presidency is sui generis, it is unlikely that any other official can make out a valid claim to absolute immunity under the rule of Nixon v. Fitzgerald. The decision, however, could have significant impact in other respects.

Nixon v. Fitzgerald suggests that the Court will tilt in favor of the presidency and the executive branch when the separation of powers doctrine is implicated in the future. In United States v. Nixon, the Court failed to reach the question of whether judicial process over the President for the purpose of civil suits could be justified. Nixon v. Fitzgerald provides an emphatic answer to this question. Another question the Court reserved was the separation of powers implications of congressional demands for information. On the strength of Nixon v. Fitzgerald, the majority of the Court will approach the question with a heavy bias towards presidential prerogatives.

168. See Halpern, 606 F.2d at 1213 ("District Courts should be sensitive to the extraordinary practical difficulties confronting a President who is charged in such a suit."). See also Brief for Respondent at 28, Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982) ("With respect to the incumbent, the district court can stay all proceedings until he leaves office.").
171. 606 F.2d at 1212.
172. 418 U.S. at 712 n.19.
Taken together, the Fitzgerald cases demonstrate that a significant shift has occurred in the Court's view of official liability. In the 1970's, the Court dramatically expanded official liability by recognizing in Bivens a right of redress against government officials derived solely from the Constitution. In Economou, the Court took steps to safeguard this right by qualifying the immunity available to officials sued for damages. Nixon v. Fitzgerald and Harlow v. Fitzgerald show that the period of expansion of official liability has ended. With these decisions, the Court has contracted liability in response to the growth in civil suits against public officials. This contraction of liability is likely to continue.

VII. CONCLUSION

In Nixon v. Fitzgerald, the Supreme Court has departed abruptly from nearly two hundred years of precedent on the official immunity issue and the separation of powers doctrine. These departures weaken longstanding values embodied in that case law, values that have served this country well. Prior immunity cases reflect the Court's historic commitment to equal justice under law and to vindicating individual rights of redress without undermining the public's interest in effective government. Prior separation of powers cases have allowed the Court to accommodate the competing interests of the federal government's branches and to preserve the balance envisioned by the framers. The Court's violation of these important principles simply is not compelled by the Constitution or public policy. The new qualified immunity standard alone would protect the government from institutional harm without undercutting the ability of the courts to satisfy meritorious claims for damages.

Theodore P. Stein

---

173. See Halperin v. Kissinger, 606 F.2d at 1214 (Gesell, J., concurring) ("We should not close our eyes to the fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials. . . . The effect of this development upon the willingness of individuals to serve their country is obvious.").

174. For example, the Court has indicated that officials who perform foreign policy or national security functions deserve absolute immunity from civil suit. Harlow, 102 S. Ct. at 2735. See also Fitzgerald, 102 S. Ct. at 2703; The Supreme Court, 1981 Term, 96 Harv. L. Rev. 62, 236 (1982).