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***Nixon v. Fitzgerald*: Recognition of Absolute Immunity From Personal Damage Liability for Presidential Acts**

Although traditionally it has been recognized that the President is absolutely immune from personal damage liability for his official acts, there is no precedent for this rule in constitutional text or case law. However, in the case of Nixon v. Fitzgerald, the Supreme Court overruled lower federal courts in establishing a clear precedent for the President's absolute immunity from personal liability for civil damages. The author examines this decision in light of traditional principles of official immunity and analyzes the Court's holding from the standpoint of whether the President is indeed placed "above the law."

I. INTRODUCTION

Historically, the President's absolute immunity from damages liability for his official acts has been generally recognized¹ and seldom challenged.² Recent decisions appeared to jeopardize this shield of immunity and signaled a possible erosion of the traditional judicial deference towards the executive branch.³ However, this trend was decisively halted in *Nixon v. Fitzgerald*.⁴ In a five-to-four decision, the United States Supreme Court held that the President is absolutely immune from damages liability predicated on his official acts, including those acts within the "outer perimeter" of the President's official responsibility.⁵

Justice Powell, writing for the majority in *Fitzgerald*,⁶ consid-

1. See *Reese v. Nixon*, 347 F. Supp. 314, 316-17 (C.D. Cal. 1972). See also *Barr v. Matteo*, 360 U.S. 564, 582-83 (1959) (Warren, C.J., dissenting) (referring without citation to the President's absolute immunity).

2. See *United States v. Nixon*, 418 U.S. 683 (1974); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866). See also *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14, 692d).

3. See *United States v. Nixon*, 418 U.S. 683 (1974); *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979) *aff'd* 424 F. Supp. 838 (D.D.C. 1976), *cert. granted*, 446 U.S. 951 (1980), *reh'g denied*, 453 U.S. 928 (1981); *Smith v. Nixon*, 606 F.2d 1183 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (1981), *reh'g denied*, 453 U.S. 928 (1981); *Clark v. United States*, 481 F. Supp. 1086 (S.D.N.Y. 1979), *appeal dismissed*, 624 F.2d 3 (2d Cir. 1980).

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

5. *Id.* at 2701, 2705.

6. Justice Powell was joined by Chief Justice Burger, Justice Stevens, Justice Rehnquist, and Justice O'Connor. Chief Justice Burger wrote a separate concurring opinion.

ered this immunity to be "a functionally mandated incident of the president's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history."⁷ Analogizing the office of the President to the position of judges and prosecutors, Justice Powell believed that the President's special responsibilities coupled with the possible diversion of his energies by concern with private lawsuits would be detrimental to the effective functioning of the government.⁸ This reasoning drew a furious and lengthy dissent from Justice White.⁹ The majority was criticized for focusing on the office of the President in making its blanket grant of immunity rather than on the President's functions.¹⁰ Furthermore, although Justice Powell assured potential critics of the decision that there were still protections against presidential misconduct,¹¹ Justice White declared that the ruling "places the President above the law."¹²

Although *Fitzgerald* significantly insulates future presidents from damages liability, it does not place the President above the law. The Watergate scandal and President Nixon's subsequent resignation demonstrate that the checks on presidential misconduct devised by our nation's founders are still effective. Instead, *Fitzgerald* articulates the belief that the needs of a system of government must sometimes outweigh the right of individuals to collect damages.¹³ The special nature of the President's constitutional office and functions distinguish him from other executive officials who are afforded qualified immunity.¹⁴ As Justice Powell correctly concluded, subjecting the President to the additional concerns of civil litigation for his official acts could affect his performance in a manner detrimental to the public interest.¹⁵ The *Fitzgerald* holding signifies the growing awareness of the enormous pressure and accountability exerted on the President.

The purpose of this note will be to outline the historical development of the doctrine of immunity in relation to state and federal executive officials, including the President. Additionally, this

7. *Id.* at 2701.

8. *Id.* at 2703.

9. Justice White was joined by Justice Brennan, Justice Marshall, and Justice Blackmun. Justice Blackmun wrote a separate dissenting opinion which was joined by Justice Brennan and Justice Marshall.

10. *Id.* at 2709-10 (White, J., dissenting).

11. Justice Powell identified the protections of impeachment, vigilant oversight by Congress, scrutiny by the press, and other incentives encouraging good behavior. *Id.* at 2705-06. See *infra* notes 143-49 and accompanying text.

12. 102 S. Ct. at 2711 (White, J., dissenting).

13. *Id.* at 2706 (Burger, C.J., concurring).

14. See *Butz v. Economou*, 438 U.S. 478 (1978); *Woods v. Strickland*, 420 U.S. 308 (1975). See also *infra* notes 60-68.

15. 102 S. Ct. at 2703.

note will attempt to facilitate the reader's understanding of the facts of *Fitzgerald*, as well as the reasoning of the majority and minority opinions. Finally, the author will provide an overall analysis of the Supreme Court's decision and will speculate as to the future impact of the *Fitzgerald* holding.

II. HISTORICAL BACKGROUND OF OFFICIAL IMMUNITY

There is uncertainty among the courts and commentators as to the precise definition and proper application of the principle of immunity.¹⁶ Perhaps this is a reflection of its desultory development as a doctrine of the English common law.¹⁷ In fact, legal scholars are uncertain how the doctrine of immunity ever became transplanted in the United States.¹⁸ Nevertheless, the doctrine was accepted by the Supreme Court in 1824 and became established law.¹⁹

16. "The term 'immunity' is referred to variously as 'absolute immunity,' 'sovereign immunity,' 'presidential immunity,' 'executive immunity,' and 'official immunity' in the case law and literature on the subject." Note, *Halperin v. Kissinger: The D.C. Circuit Rejects Presidential Immunity From Damage Actions*, 26 LOY. L. REV. 144, 144 n.1 (1980). Unfortunately, much of the case law on the subject does not distinguish between immunity from liability and immunity from judicial process, nor between executive privilege and executive immunity. *Id.* One scholar noted at least three distinct meanings of the term "executive privilege." First, "[t]he privilege might be invoked as an immunity of the President from legal process." Second, it may be meant as "an exemption from a duty to produce testimony or documents and a legal capacity to control the production of certain kinds of evidence by others." Finally, it may constitute "a substantive immunity from liability, qualified or absolute." Absolute immunity, "designed to protect certain discretionary functions from even the burden of litigation, is more familiar in the law of torts than of crimes, perhaps because of the greater public concern and the greater screening process in the bringing of actions in the latter area." Freund, *The Supreme Court, 1973 Term — Forward: On Presidential Privilege*, 88 HARV. L. REV. 13, 19, 20 & n.41 (1974). Similarly, there is confusion about the distinction between a privilege and an immunity. Prosser has commented that the difference between a privilege and an immunity is "largely one of degree;" while a privilege avoids tort liability under "particular circumstances [A]n immunity . . . avoids liability . . . under all circumstances, within the limits of the immunity itself; it is conferred, not because of the particular facts, but because of the status or position of the favored defendant; and it does not deny the tort, but the resulting liability." Note, *Halperin v. Kissinger: The D.C. Circuit Rejects Presidential Immunity from Damage Actions*, 26 LOY. L. REV. 144, 144 n.1 (1980) (quoting W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 970 (4th ed. 1971)).

17. See Note, *supra* note 16, at 147 n.11; Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 NW. U.L. REV. 526, 528 n.14 (1977).

18. Note, *supra* note 16, at 147 n.11.

19. *Id.* See *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824).

The Supreme Court in *Nixon v. Fitzgerald* relies to a significant extent on public policy arguments to support its decision.²⁰ Similar policy considerations, originally formulated to support judicial immunity, have traditionally been used to support the recognition of immunity for federal and state executive officials.²¹ One argument is that it would be unfair to penalize a public official for wrong decisions made in the exercise of his discretion.²² Perhaps this policy is a recognition of the uncertainty of the litigation process. The difficulty in determining blame for discretionary decisions will necessarily result in innocent officers being penalized along with the guilty. Another policy argument emphasizes the possible deterrence of public officials in the performance of their duties if they lack protection from damage liability.²³ Not only may the threat of liability promote cowardly decision-making, but it may also dissuade individuals with the greatest ability from even entering public service.²⁴ Finally, it is argued that defending themselves from lawsuits will distract officials from public business.²⁵ Concern with personal liability will lessen the effectiveness of the official's performance to the detriment of an efficient government and the public interest.²⁶

Although the federal courts have recognized a plaintiff's right to injunctions against continued unconstitutional conduct, rules for the protection of public officials, derived from the doctrine of immunity and the policy considerations supporting it, have often precluded money judgments.²⁷ There are three approaches which courts have used in fashioning rules to protect public officials from liability. The first approach, absolute immunity, results in the immediate dismissal of a lawsuit if it involves acts of the official in the performance of his official duties.²⁸ The summary na-

20. See *infra* note 129 and accompanying text.

21. Freed, *supra* note 17, at 529.

22. See, e.g., *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347-48 (1871). See also Gray, *Private Wrongs of Public Servants*, 47 CALIF. L. REV. 303, 310 (1959); Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 271-72 (1937).

23. Freed, *supra* note 17, at 529.

24. *Wood*, 420 U.S. at 331 (Powell, J., dissenting in part). See also Freed, *supra* note 17, at 529, n.205; Gray, *supra* note 22, at 310; Jennings, *supra* note 22, at 271-72.

25. Freed, *supra* note 17, at 529.

26. See *Biddle*, 177 F.2d at 581; Freed, *supra* note 17, at 529-30; Jennings, *supra* note 22, at 271-72.

27. Freed, *supra* note 17, at 526.

28. *Id.* at 527. "Absolute immunity is not, [however], unlimited, but only protects 'official conduct' — as 'having more or less connection with the general matters committed by law to [the official's] control or supervision.'" Note, *Presidential Immunity From Constitutional Damage Liability*, 60 B.U.L. REV. 879, 883 (1980) (quoting *Spalding v. Vilas*, 161 U.S. 483, 498 (1896)). Although it is agreed that no protection should be afforded the official who acts maliciously or in bad faith, a determination of his intent would necessarily require litigation. *Id.* at 883-

ture of this approach not only insulates the official from ultimate liability, but it also relieves him from most of the burdens of litigation.²⁹ The second approach, qualified immunity, provides protection only when the official acts within the scope of his authority and in good faith.³⁰ In order to establish the element of good faith, officials often must litigate the merits of their actions in a contested case.³¹ The final approach is to afford no protection to the official.³² Officials are absolutely liable if their conduct is proven to be unlawful.³³ The first two approaches will be examined in greater detail as they relate to the development of presidential immunity.

A. Traditional Absolute Immunity

In an early decision on federal executive immunity, *Kendall v. Stokes*,³⁴ the Supreme Court held that the Postmaster General of the United States would not be liable for mistakes in carrying out his assigned duties provided he acted without malice. The rule established was that certain wrongs may be committed on behalf of the government, and if authorized both in fact and in contem-

84. This would effectively frustrate the inherent purpose of according absolute immunity. *Id.*

29. Freed, *supra* note 17, at 527. Absolute immunity is not intended to primarily benefit the official, but is an indirect way to further the public interest. "These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal." See *Tenney v. Brandhove*, 341 U.S. 367, 373-74 (1951) (quoting *Coffin v. Coffin*, 4 Mass. 1, 27 (1808)).

30. Freed, *supra* note 17, at 527.

31. *Id.* Most courts require an affirmative showing by the defendant that he acted with a reasonable, good-faith belief in the lawfulness of his conduct. See, e.g., *Butz v. Economou*, 438 U.S. 478, 497-98 (1978) (dictum); *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974); *Dellums v. Powell*, 566 F.2d 167, 176 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978), *reh'g denied*, 439 U.S. 886 (1978); *Skehan v. Board of Trustees*, 538 F.2d 53, 61 (3d Cir. 1976), *cert. denied*, 429 U.S. 979 (1976); *McCray v. Burrell*, 516 F.2d 357, 370 (4th Cir. 1975), *cert. dismissed*, 426 U.S. 471 (1976); *Smith v. Losee*, 485 F.2d 334, 342 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339, 1347-48 (2d Cir. 1972). However, the First and Seventh Circuits apparently place the burden of proof on the plaintiff. See *Hanneman v. Breier*, 528 F.2d 750, 756 (7th Cir. 1976) ("damages are appropriate only if plaintiffs prove defendant's bad faith"); *Palmigiano v. Mullen*, 491 F.2d 978, 980 (1st Cir. 1974) ("plaintiff must also show that he is prepared to prove the defendants' bad faith or at least such a degree of neglect or malice . . . as to deprive defendants of official immunity . . .").

32. Freed, *supra* note 17, at 527.

33. *Id.*

34. 44 U.S. (3 How.) 87 (1845).

plation of law they are not personal wrongs of the official.³⁵ Thus, for the immunity to apply, the official had to show that his act was legally capable of being authorized and was within the scope of his authority.³⁶

The *Kendall* rule was expanded in *Spalding v. Vilas*,³⁷ a cause of action for defamation. The Court held that the Postmaster General was absolutely immune regardless of any malicious motives he may have had for his action.³⁸ The only limitation on the scope of the immunity was the requirement that the official's acts be within the scope of his authority.³⁹ Thus, *Spalding* has been cited for the proposition that a public official is privileged with respect to his defamatory statements if the statements have "more or less connection with the general matters committed by law to his control or supervision."⁴⁰

Absolute immunity was last recognized by the Supreme Court in *Barr v. Matteo*,⁴¹ another lawsuit for defamation. While the *Spalding* decision can be interpreted to apply only to "heads of Executive Departments,"⁴² *Barr* extended the protection of absolute immunity to low-level federal administrative officials.⁴³ The plurality Court reasoned that the immunity did not attach to the office of the official, but rather applied to those functions requiring the exercise of discretion.⁴⁴ This rationale reflects the policy considerations discussed previously.⁴⁵ The functional approach for recognition of immunity emphasized by the Court is the domi-

35. Engdahl, *Immunity and Accountability For Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 48 (1972).

36. *Id.*

37. 161 U.S. 483 (1896).

38. *Id.* at 498. The Court relied on the policies supporting judicial immunity, reasoning that "[t]he interests of the people require that due protection be accorded to [executive officers] in respect of their official acts" and that liability "would seriously cripple the proper and effective administration of public affairs" *Id.*

39. *Id.* at 499.

40. Engdahl, *supra* note 35, at 52. The language quoted is from *Spalding*, 161 U.S. at 498. See *Barr v. Matteo*, 360 U.S. 564, 570-74 (1959), and lower court cases cited at *Barr*, 360 U.S. at 572 n.9.

41. 360 U.S. 564 (1959).

42. *Spalding*, 161 U.S. at 498.

43. *Barr*, 360 U.S. at 572-73.

44. *Id.* at 575.

We do not think that the principle announced in *Vilas* can properly be restricted to executive officers of cabinet rank The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions

Id. at 572-73. Freed, *supra* note 17, at 531-32.

45. See *supra* notes 21-26 and accompanying text.

nant theme of Justice White's dissent in *Fitzgerald*.⁴⁶ Significantly, lower federal courts did not limit *Barr* to claims of defamation but applied it generally to preclude other tort actions based on "discretionary" acts of federal executive officials.⁴⁷

B. Qualified Executive Immunity

Courts initially applied the doctrine of qualified immunity to state executives sued under the Civil Rights Act of 1871⁴⁸ for violating constitutional rights.⁴⁹ Because of the common law doctrine of sovereign immunity, it has been the rule of American law that consent is necessary to prosecute a suit against the government.⁵⁰ Thus, because of the absolute immunity afforded to federal executive officials by the *Kendall*, *Spalding*, and *Barr* line of cases, only state officials, pursuant to section 1983, were subject to a civil suit for violations of constitutional rights.⁵¹

However, in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,⁵² the Supreme Court established the rule that a damage action will lie for a violation of an individual's

46. See 102 S. Ct. at 2709, 2720-23 (White, J., dissenting).

47. Freed, *supra* note 17, at 532. See, e.g., *Sowders v. Damron*, 457 F.2d 1182 (10th Cir. 1972) (Internal Revenue officers-action for misrepresentation); *Estate of Burks v. Ross*, 438 F.2d 230 (6th Cir. 1971) (government-employed physician-action for wrongful death); *Bridges v. IRS*, 433 F.2d 299 (5th Cir. 1970) (Internal Revenue officers-action for conversion); *Morgan v. Willingham*, 424 F.2d 200 (10th Cir. 1970) (federal prison warden and chief medical officer of prison-action for battery); *Peltzman v. Smith*, 404 F.2d 335 (2d Cir. 1968) (Commandant of Coast Guard-action for wrongful withholding of radio operator's license). For additional cases, see Freed, *supra* note 17, at 533 n.36.

48. 42 U.S.C. § 1983 (1976) [hereinafter cited as § 1983] provides in pertinent part:

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.

Id.

49. Note, *supra* note 28, at 886.

50. Lehmann, *Bivens and Its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials*, 4 HASTING CONST. L.Q. 531, 532 (1977). See *Kwananako v. Polyblank*, 205 U.S. 349, 353 (1907); *United States v. Lee*, 106 U.S. 196, 204-07 (1882); *Hill v. United States*, 50 U.S. (9 How.) 386, 389 (1850); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1821).

51. See *supra* notes 34-47.

52. 403 U.S. 388 (1971).

constitutional rights by federal agents.⁵³ Although the Court did not address the issue of absolute immunity for the agents, upon remand the Second Circuit Court of Appeals rejected a claim for such immunity and held that the public interest would be sufficiently protected by affording the agents a qualified immunity.⁵⁴ Other circuits subsequently considering the issue consistently followed the Second Circuit's holding.⁵⁵

Recognizing the strong support by the lower federal courts for qualified immunity, the Supreme Court reinterpreted the holdings of *Barr* and *Spalding*. In *Scheuer v. Rhodes*,⁵⁶ a section 1983 lawsuit against the governor of Ohio and other high-level state officials, the Court held that only a variable qualified immunity was available to state executives. Availability of the immunity was dependant upon the scope of discretion of the official, the responsibilities of his office, and a good faith belief that his actions were legal and constitutional.⁵⁷ Two public policy considerations, unfairness and deterrence, were relied upon by the Court.⁵⁸ The Court reasoned that a grant of absolute immunity to state officials would result in section 1983 being "drained of meaning."⁵⁹

Policy considerations were also dominant in the Court's decision in *Wood v. Strickland*,⁶⁰ a section 1983 lawsuit brought against state school officials by students challenging their expulsion from school. Again faced with the question of executive immunity, the Court refined the *Scheuer* standard by bifurcating the concept of "bad faith" into objective and subjective components. The objective standard finds bad faith when the official "knew or reasonably should have known" his actions were a violation of constitutional rights.⁶¹ The subjective standard permits damages

53. Initially, the *Bivens*' holding was a narrow one limited to a violation of the fourth amendment's guarantee against unreasonable searches and seizures. However, in *Davis v. Passman*, 442 U.S. 228, 242 (1979), the Court implied a *Bivens* cause of action would apply to every constitutional violation. Note, *supra* note 28, at 892.

54. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972).

55. See, e.g., *G.M. Leasing Corp. v. United States*, 560 F.2d 1011 (10th Cir. 1977) (Internal Revenue officers); *Jones v. United States*, 536 F.2d 269 (8th Cir. 1976) (members of U.S. Attorney's office and a U.S. Marshall); *Mark v. Groff*, 521 F.2d 1376 (9th Cir. 1975) (Internal Revenue officers); *Paton v. La Prade*, 524 F.2d 862 (3d Cir. 1975) (FBI agents); *Apton v. Wilson*, 506 F.2d 83 (D.C. Cir. 1974) (high officials in U.S. Department of Justice); *Brubaker v. King*, 505 F.2d 534 (7th Cir. 1974) (special agent of U.S. Bureau of Customs); *States Marine Lines Inc. v. Shultz*, 498 F.2d 1146 (4th Cir. 1974) (agents of U.S. Bureau of Customs).

56. 416 U.S. 232 (1974).

57. *Id.* at 247-48.

58. *Id.* at 241-42 n.7. See *supra* notes 22-24 and accompanying text.

59. *Scheuer*, 416 U.S. at 248.

60. 420 U.S. 308 (1975), *reh'g denied*, 421 U.S. 921 (1975).

61. *Id.* at 322.

liability when the official acts "with the malicious intention to cause a deprivation of constitutional rights. . . ."⁶² Only one of the two components needs to be satisfied in order for a defendant to lose his immunity from suit.⁶³

Obviously the *Bivens*, *Scheuer*, and *Wood* precedents are incompatible with the *Kendall*, *Spalding*, and *Barr* precedents. Perhaps recognizing its inconsistent decisions, the Supreme Court sought to clarify its position regarding immunity in *Butz v. Economou*.⁶⁴ In *Butz*, the Court addressed for the first time the scope of immunity available to federal executive officials who are sued for violations of constitutional rights.⁶⁵ Asserting that federal and state executive officials should be treated identically for the purpose of immunity, the Court held that federal officials are only protected by a qualified immunity.⁶⁶ However, those federal executive officials performing prosecutorial, adversarial, or quasi-judicial functions remain absolutely immune from damages liability for constitutional violations.⁶⁷ Although the *Butz* decision received criticism for its "flawed reasoning," it served as the springboard for extending the application of qualified immunity to the President.⁶⁸

C. Presidential Immunity

The text of the Constitution does not expressly permit the federal judiciary to exercise jurisdiction over the President.⁶⁹ Al-

62. *Id.*

63. *Id.*

64. 438 U.S. 478 (1978).

65. The plaintiff, Arthur N. Economou, alleged that the Department of Agriculture had instituted proceedings to suspend his registration as a commodities dealer without giving him fair notice of the proceedings or an opportunity to publicly respond to the administrative complaint. *Id.* at 481-83. The proceedings were allegedly in retaliation for his criticism of the agency. *Id.* at 480. Economou sought money damages for first and fifth amendment violations against the Secretary of Agriculture, Earl Butz, and other high-level officials in the department. *Id.* at 482 n.2.

66. *Id.* at 496-507.

67. *Id.* at 508-17. Although public officials perform certain functions that entitle them to absolute immunity, the immunity attaches to particular functions and not to particular offices. *Id.* If officials are performing functions for which they enjoy only qualified immunity, the officials are liable in damages if their conduct violates the law or if they should have realized that their conduct was illegal. *Id.* at 507.

68. See Note, *supra* note 28, at 891-94.

69. *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 608-09 (D.C.

though *Marbury v. Madison*⁷⁰ established the existence of judicial review of the acts of the federal branches of government, it failed to answer whether the courts could assert subject matter jurisdiction over suits brought directly against the President. Nevertheless, until recently, the President's absolute immunity from personal damage liability for his official acts has been generally accepted.

The earliest direct action against the President occurred in 1811. In *Livingston v. Jefferson*,⁷¹ a lawsuit was brought against Thomas Jefferson for acts committed while he was President. The Court never considered the immunity issue because the suit was dismissed for being improperly brought in Virginia.⁷²

In 1866 the Supreme Court had its first real opportunity to consider the President's amenability to the Court's jurisdiction. In *Mississippi v. Johnson*,⁷³ President Andrew Johnson was sued by the State of Mississippi to enjoin his execution of the allegedly unconstitutional Reconstruction Acts.⁷⁴ Relying on *Marbury*, the Court treated the injunction as analogous to a writ of mandamus and refused to rule on the jurisdiction of a suit brought directly against the President.⁷⁵

Since *Johnson*, the federal courts have reviewed presidential acts, but not in the context of a civil suit brought directly against the President.⁷⁶ Recent cases in the federal courts have required resolution of the issue of presidential immunity. In *Halperin v. Kissinger*,⁷⁷ the Court of Appeals for the District of Columbia

Cir. 1974); see G. GUNTHER, CASES & MATERIALS ON CONSTITUTIONAL LAW 436 (10th ed. 1980).

70. 5 U.S. (1 Cranch) 137 (1803).

71. 15 F. Cas. 660 (C.C. Va. 1811) (No. 8,411).

72. *Id.* at 663.

73. 71 U.S. (4 Wall.) 475 (1866).

74. *Id.* at 497.

75. *Id.* at 498-501. In *Marbury*, the Supreme Court asserted that writs of mandamus could be issued against cabinet officers to compel the performance of ministerial duties affirmatively imposed by law. *Marbury*, 5 U.S. at 171-73. However, such writs could not issue against the President since his duties were discretionary. *Id.* at 169-70. But see *National Treasury Employees Union*, 492 F.2d at 601 (statute can impose ministerial duty on President).

76. Note, *supra* note 28, at 897-98.

77. 606 F.2d 1192 (D.C. Cir. 1979). In *Halperin*, a former member of the National Security Council staff and his family brought suit for damages against ten federal officials alleging that a wiretap of plaintiff's home telephone violated the fourth amendment and Title III of the Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, 82 Stat. 212 (1968) (codified at 18 U.S.C. §§ 2510-2520 (1976)). *Id.* at 1195. The basis of the decision was: (1) the constitutional scheme reveals no indication that any kind of immunity was intended for the President or the Executive Branch; (2) a proper regard for the separation of powers does not allow the courts to evade their constitutional responsibility to delineate the obligations and powers of each branch; (3) any inhibiting effect that such suits might have on the presidential will to act will not hinder effective governing of the nation; (4) the

held that President Nixon was not entitled to absolute immunity from an action for damages brought by a citizen subjected to an unconstitutional and illegal wiretap. In a related case, *Clark v. United States*,⁷⁸ a federal district court denied President Nixon's motion to dismiss a damage suit alleging unconstitutional surveillance. Both courts relied on *Butz* in ruling that the President may be held personally liable for bad faith violations of constitutional rights.⁷⁹

Although *Halperin* is before the Supreme Court on a writ of certiorari, no decision has been rendered.⁸⁰ Therefore, the Court in *Nixon v. Fitzgerald* was faced with an issue of first impression when it decided the scope of immunity available to the President of the United States.⁸¹

III. FACTUAL BACKGROUND

On January 5, 1970, A. Ernest Fitzgerald was dismissed from his position with the Department of the Air Force allegedly in retaliation for testimony he had given before a congressional subcommittee in November, 1968.⁸² Officials in the Department of Defense were embarrassed by Fitzgerald's disclosure of cost overruns of approximately \$2 billion and unexpected technical difficulties concerning development of the C-54 military transport plane.⁸³ Public hearings convened by the Subcommittee on Economy in Government focused public attention on Fitzgerald's dis-

personal burden on the President of having to answer civil suits is not so great since he is represented by the government if he is sued for his official actions; and (5) the application of qualified immunity to a President is mandated by an American tradition of equal justice under the law. *Id.* at 1211-13.

78. 481 F. Supp. (S.D.N.Y. 1979).

79. *Halperin*, 606 F.2d at 1208-13; *Clark*, 481 F. Supp. at 1091-92.

80. *Kissinger v. Halperin*, 446 U.S. 951 (1980).

81. See 102 S. Ct. at 2697.

82. *Id.* at 2693-94. See *Economics of Military Procurement: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Comm.*, 90th Cong., 2d Sess., Part I (1968-1969). Fitzgerald was Deputy for Management Systems in the office of the Assistant Secretary of the Air Force for Financial Management from September 20, 1965, until his termination. Fitzgerald was notified on November 4, 1969, that his job had been abolished through a reduction-in-force, economy reorganization, termination to be effective January 5, 1970. *Fitzgerald v. Seamans*, 553 F.2d 220, 222 (D.C. Cir. 1977). Fitzgerald appeared before the Committee on November 13, 1968, and within two months, Department of Defense staff had prepared a memorandum for Secretary of the Air Force, Harold Brown, listing three ways by which Fitzgerald might be removed from his position. Among these was by a reduction-in-force. 102 S. Ct. at 2694 n.1.

83. 102 S. Ct. at 2694.

missal.⁸⁴ This led to questioning of President Nixon, who promised to investigate and thereafter did attempt to provide alternative federal employment for Fitzgerald.⁸⁵

When he was unable to obtain reassignment, Fitzgerald requested a hearing before the Civil Service Commission.⁸⁶ In May, 1971, the Commission convened hearings on Fitzgerald's allegations that he was wrongfully fired.⁸⁷ Preferring to present his grievance in public, Fitzgerald sought and was granted a permanent injunction against further closed hearings.⁸⁸ After a final judgment was entered in Fitzgerald's favor, the public Civil Service Commission proceedings began again, on January 26, 1973.⁸⁹

84. *Id.* at 2694. The press reported these hearings promptly, as it had the earlier announcement that Fitzgerald's job was being eliminated by the Department of Defense. *Id.* See *The Dismissal of A. Earnest Fitzgerald by the Department of Defense: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Comm.*, 91st Cong., 1st Sess. (1969).

85. 102 S. Ct. at 2694. Nixon was questioned about Fitzgerald's impending dismissal at a news conference on December 8, 1969. Nixon asked White House Chief of Staff H.R. Haldeman to arrange for Fitzgerald's reassignment to another job within the administration. Nixon also suggested to Budget Director Robert May that a position in the Bureau of the Budget might be offered to Fitzgerald. However, administration officials resisted Fitzgerald's reassignment and May stated that high level positions were unavailable within the Bureau of the Budget. *Id.* at 2694 n.7.

86. *Id.* at 2695. In a letter of January 20, 1970, Fitzgerald alleged that his separation represented retaliation for his truthful testimony before a congressional subcommittee. *Id.* As a preference eligible (Fitzgerald is a veteran which entitles him to certain Civil Service benefits afforded to "Preference eligibles" pursuant to 5 U.S.C. § 2108 (1977)), Fitzgerald has a right, pursuant to 5 U.S.C. §§ 7511-7512, 7701 (1980), to a hearing in his appeal to the Civil Service Commission of an "adverse action" taken against him by an agency. *Fitzgerald v. Hampton*, 467 F.2d 755, 757-58 (D.C. Cir. 1972).

87. *Hampton*, 467 F.2d at 757. Fitzgerald's numerous requests that the hearings be open to the public and the press were denied. The Commission relied on 5 C.F.R. § 772.305(c)(3) (1973), which specifically excludes the public and press from the hearings. *Id.* at 758. Fitzgerald alleged he was wrongfully fired pursuant to 5 U.S.C. § 7512(a)(1980), which provides: "[a]n agency may take adverse action against a preference eligible employee . . . only for such cause as will promote the efficiency of the service." *Id.* at 758 n.9.

88. *Fitzgerald v. Hampton*, 329 F. Supp. 997, 999 (D.D.C. 1971), *aff'd*, 467 F.2d 755 (D.C. Cir. 1972). The district court held that Fitzgerald was constitutionally entitled to have the hearing open to the public and the press because the hearing was an adversary proceeding, the final outcome would be a decision on the merits of issues raised, and the decision would directly affect his legal rights. *Id.* at 998. The court recognized the doctrine, established in *Wolf Corp. v. Securities and Exchange Comm'n*, 317 F.2d 139 (1963), that "judicial power should not be used to restrain the processes of a regulatory body exercising quasi-judicial powers which can be judicially reviewed as a matter of right before they become final." *Id.* at 999. However, the Court justified intervention by relying on *Amos Treat & Co. v. Securities and Exchange Comm'n*, 306 F.2d 260 (1962), which held that at the very least, quasi-judicial proceedings entail a fair trial. The Court had long asserted that it is imperative that agencies use the procedures which have traditionally been associated with the judicial process (i.e., hearings open to the public and press). *Id.* at 998.

89. 102 S. Ct. at 2695. Much of the publicity generated by the proceeding was

After extensive testimony,⁹⁰ the Chief Appeals Examiner for the Civil Service Commission held that Fitzgerald's dismissal was illegal and recommended reappointment to his prior position or to a job of comparable authority, with back pay.⁹¹

Following this decision, Fitzgerald filed a civil suit for damages in the United States district court.⁹² Various Defense Department officials and White House aides were named as defendants.⁹³ The district court granted defendants' motion for summary judgment holding that the action, filed four years after Fitzgerald's dismissal, was barred under the District of Columbia's three-year statute of limitations.⁹⁴ The court of appeals affirmed as to all but one defendant, White House aide Alexander Butterfield.⁹⁵ Finding that Fitzgerald had no knowledge of, or reason to suspect, any White House involvement in his removal until an internal White House memorandum was publicized in 1973,⁹⁶ the court, relying

devoted to the testimony of Air Force Secretary Robert Seamans. *Id.* Although denying Fitzgerald lost his job in retaliation for his congressional testimony, Seamans admitted he had received "some advice" from the White House before Fitzgerald's job was abolished. *Id.* Seamans claimed executive privilege in regard to the substance of those conversations. *Id.*

90. Over 4,000 pages of testimony was heard. *Id.*

91. *Id.* at 2695-96. The Examiner held that the Commission's adverse action procedures (current version codified at 5 C.F.R. § 752 (1982)), implicitly forbid the Air Force to employ "a reduction in force" as a means of dismissing Fitzgerald for reasons which were entirely personal to him. *Id.* at 2696 n.16. However, the Examiner found that the evidence in the record failed to support Fitzgerald's allegations that he was dismissed in retaliation for his congressional testimony on November 13, 1968. *Id.* at 2696.

92. *Fitzgerald v. Seamans*, 384 F. Supp. 688 (D.D.C. 1974), *modified*, 552 F.2d 220 (D.C. Cir. 1977). The complaint alleged a continuing conspiracy to deprive Fitzgerald of his job, to deny him reemployment, and to besmirch his reputation. The cause of action was for \$3.5 million in compensatory and punitive damages. *Id.* at 690.

93. Affidavits submitted indicate that former President Nixon, former Secretary of State Henry Kissinger, and former White House aides Haldeman, Erlichman, Colson, Dean, Magruder, Klein, Nofziger, and Ziegler were among the potential "John Doe" defendants. *Id.* at 691 n.3.

94. *Id.* at 698. The action was barred despite the fact that the complaint was framed to allege a continuing conspiracy which had prevented Fitzgerald from bringing a timely action. The Court held, as a matter of fact, that Fitzgerald knew the essential facts alleged in his complaint and had not been precluded from bringing a timely action by any fraudulent concealment of material facts by the defendants. *Id.* at 698.

95. *Seamans*, 553 F.2d at 229, 231.

96. *Id.* at 229. In the memorandum of January 20, 1970, White House aide Butterfield reported to H.R. Haldeman that "Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the

on *Holmberg v. Armbrecht*,⁹⁷ held that fraudulent concealment of the cause of action tolled the statute of limitations.⁹⁸ The action against Butterfield was remanded for further proceedings in the district court.⁹⁹

In a second amended complaint filed on July 5, 1978, Richard Nixon was named for the first time as a party defendant.¹⁰⁰ Other officials in the Nixon Administration were included, but by March, 1980, only Nixon and White House aides Bryce Harlow and Butterfield remained as defendants.¹⁰¹ The district court denied a motion for summary judgment, holding that Fitzgerald had stated triable causes of action under the first amendment of the Constitution¹⁰² and the common law of the District of Columbia,¹⁰³ and was entitled to "infer" a cause of action under two federal statutes.¹⁰⁴

After the district court rejected a claim of absolute presidential immunity, Nixon took a collateral appeal to the court of appeals.¹⁰⁵ Relying on *Halperin v. Kissinger*, where it had rejected a similar claim of immunity, the court summarily dismissed Nixon's appeal.¹⁰⁶ The Supreme Court recognized the *Halperin* ruling, but granted certiorari because it had never decided the scope of immunity available to the President.¹⁰⁷

name of the game." 102 S. Ct. at 2694. "Butterfield therefore recommended that '[w]e should let him bleed, for a while at least.'" *Id.* at 2694-95.

97. 327 U.S. 392 (1946). In *Holmberg*, the Court held that where fraudulent conduct of the defendant has prevented the plaintiff from being diligent in filing an action within the statute of limitations, equity bars a defendant from setting up such a defense. *Id.* at 396-97.

98. *Seamans*, 553 F.2d at 228.

99. 102 S. Ct. at 2696.

100. *Id.* at 2697. In alleging Nixon's participation in the alleged conspiracy against him, Fitzgerald's complaint quoted Nixon's news conference of January 31, 1973, during which Nixon assumed personal responsibility for Fitzgerald's dismissal. *Id.* at 2695, 2697 n.19.

101. *Id.* at 2697. Evidence revealed by additional discovery focused the cause of action on these defendants. *Id.*

102. *Id.*

103. *Id.* at 2697 n.20. Fitzgerald subsequently abandoned his common law cause of action. *Id.*

104. *Id.* Neither of the federal statutes confer a private right to sue for relief in damages. The first, 5 U.S.C. § 7211 (Supp. III 1979), provides generally 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." The second, 18 U.S.C. § 1505 (Supp. 1982), is a criminal statute making it a crime to obstruct congressional testimony. 102 S. Ct. at 2697 n.20.

105. 102 S. Ct. at 2697.

106. *Id.* See *supra* note 77 and accompanying text.

107. 102 S. Ct. at 2698, *cert. granted*, 452 U.S. 959 (1981).

IV. THE SUPREME COURT'S ANALYSIS

A. *Jurisdictional Challenges*

Before addressing the merits of the case, Justice Powell considered two arguments presented by Fitzgerald in opposition to the petition for certiorari. First, Fitzgerald argued that the district court's interlocutory order denying Nixon's claim of absolute immunity was not an appealable case properly in the court of appeals within the meaning of 28 U.S.C. section 1254.¹⁰⁸ Relying on the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*,¹⁰⁹ Justice Powell correctly rejected this argument.¹¹⁰ Under *Cohen*, a small class of interlocutory orders which conclusively determine the question involved, resolve an important issue apart from the merits of the action, and which are effectively unreviewable on appeal from a final judgment, are immediately appealable to the courts of appeals.¹¹¹ A collateral appeal of an interlocutory order must also present "a serious and unsettled question."¹¹² By dismissing Nixon's appeal, the court of appeals appeared to accept Fitzgerald's argument that the court's controlling decision in *Halperin* prevented the appeal from raising a serious and unsettled question.¹¹³ However, Justice Powell noted that while the court of appeals ruled in *Halperin* that the President was not entitled to absolute immunity, the Supreme Court never so held.¹¹⁴ Therefore, Nixon did present a serious and un-

108. 102 S. Ct. at 2698. The statute provides in pertinent part: "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . ." 28 U.S.C. § 1254 (1966).

109. 337 U.S. 541 (1949).

110. 102 S. Ct. at 2698.

111. 337 U.S. at 546-47. At least twice before the Supreme Court has held that orders denying claims of absolute immunity are appealable under the *Cohen* criteria. 102 S. Ct. at 2698. See *Helstoski v. Meanor*, 442 U.S. 500 (1979) (claim of immunity under speech and debate clause); *Abney v. United States*, 431 U.S. 651 (1977) (claim of immunity under double jeopardy clause). In previous cases, the Court of Appeals for the District of Columbia Circuit also has treated orders denying absolute immunity as appealable under the *Cohen* ruling. 102 S. Ct. at 2698. See *Briggs v. Goodwin*, 569 F.2d 10, 58-60 (D.C. Cir. 1977) (Wilkey, J., dissenting); *McSurely v. McClellan*, 521 F.2d 1024 (D.C. Cir. 1975), *aff'd in pertinent part en banc*, 553 F.2d 1277 (D.C. Cir. 1976), *cert. dismissed sub nom. McAdams v. McSurely*, 438 U.S. 189 (1978).

112. *Cohen*, 337 U.S. at 547.

113. 102 S. Ct. at 2698. See *supra* notes 77, 105 and accompanying text.

114. 102 S. Ct. at 2698. The Supreme Court recognized that a petition for certiorari in *Halperin* was pending in the Court at the time Nixon's appeal was dis-

settled question appealable to the court of appeals and *Cohen* was applicable. Justice Powell concluded that the case was in the court of appeals under section 1254 and properly within the Supreme Court's certiorari jurisdiction.¹¹⁵

Fitzgerald's second argument against the petition for certiorari was that an agreement between the parties had rendered the controversy moot.¹¹⁶ Justice Powell dismissed this argument concluding that the limited agreement left both parties with a considerable financial stake (\$28,000) in the resolution of the question presented to the Court.¹¹⁷ Relying on *Havens Realty Co. v. Coleman*,¹¹⁸ Justice Powell ruled that given Fitzgerald's "continued active pursuit of monetary relief, the case remained 'definite and concrete,' touching the legal relations of the parties having adverse legal interests."¹¹⁹

Disagreeing with this cavalier rationale, Justice Blackmun expressed great concern over this agreement in his dissenting opinion. The settlement agreement raised the question of whether this is the kind of case over which the Court should have granted certiorari since the sum of \$28,000 left riding on an outcome favorable to Fitzgerald seems to be a wager among gamblers.¹²⁰ Although Justice Blackmun's concern with the appearance of impropriety is laudable, it is not a sufficient basis for dismissing a case of significant constitutional importance. The additional sum of money can easily be viewed as punitive damages in the event of a decision favorable to Fitzgerald. Significantly, Justice White did not appear to share Justice Blackmun's concern for nowhere in his lengthy dissent did Justice White challenge the granting of certiorari to this case.

missed. *Id.* The Court also considered the special solicitude due claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers doctrine. *Id.* See *Nixon*, 418 U.S. at 691-92 (claim of executive privilege to quash subpoena duces tecum for production of documents and tape recordings).

115. 102 S. Ct. at 2698. The Court ruled that since it had taken jurisdiction of the case, it would not remand to the court of appeals for a decision on the merits. The immunity question is a pure issue of law and concerns of judicial economy made appropriate its immediate resolution by the Court. *Id.* at 2698 n.23.

116. *Id.* at 2697, 2698-99. Under the agreement, Nixon paid Fitzgerald \$142,000. As consideration, Fitzgerald agreed to accept liquidated damages of \$28,000 in the event of a ruling by the Supreme Court that Nixon was not entitled to absolute immunity. *Id.* at 2699. In the event that Nixon's immunity claim were to be upheld, no further payments would be made. *Id.*

117. *Id.*

118. 455 U.S. 363 (1982) (agreement settling measure of damages for alleged violation of Fair Housing Act).

119. 102 S. Ct. at 2699 (quoting *Havens Realty Co.*, 455 U.S. at 371, quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)).

120. 102 S. Ct. at 2727.

B. The Majority Opinion: Scope of Presidential Immunity

Justice Powell began the Supreme Court's determination of the scope of the immunity available to the President by discussing the Court's previous decisions which recognized that government officials are entitled to some form of immunity for civil damages liability.¹²¹ These prior decisions were guided by the United States Constitution, federal statutes, history, common law in the absence of explicit constitutional or congressional guidance public policy concerns.¹²² Because the Presidency did not exist during most of the development of common law, both Justice Powell and Justice White agreed that a historical analysis of the scope of the President's immunity must draw its evidence primarily from constitutional history and structure.¹²³ Nevertheless, concern for public policy was a dominant theme in the majority opinion and was the primary target of Justice White's dissent.¹²⁴ The author believes that the lack of consensus concerning the importance and relevance of public policy in analyzing the scope of presidential immunity is responsible for this division among the Court.

The majority opinion emphasized that although Nixon was a defendant in a direct constitutional action and in two statutory actions under federal laws of general applicability, in neither case did Congress pass any legislation to subject the President to civil liability for his official acts.¹²⁵ Therefore, the Court chose not to address directly the immunity question as it would arise if Congress had expressly created a damages action against the President.¹²⁶ The Court's holding in *Fitzgerald* was intended to be a narrow one recognizing the absence of explicit affirmative action by Congress.

Fitzgerald argued that the President is entitled only to qualified

121. See *supra* notes 37-40, 56-68 and accompanying text. Justice Powell also discussed cases concerning the application of immunity to the legislative and judicial branches of government. In *Tenney v. Brandhove*, 341 U.S. 367 (1951), the Court held that the passage of § 1983, which made no express provision for immunity for any official, had not abrogated the privilege accorded to state legislators at common law. Similarly, in *Pierson v. Ray*, 386 U.S. 547 (1967), the Court, with regard to a § 1983 lawsuit against a state judge, recognized the continued validity of the absolute immunity of judges for acts within the judicial role.

122. 102 S. Ct. at 2700-01. See *Butz*, 438 U.S. at 508; *Spalding*, 161 U.S. at 498.

123. 102 S. Ct. at 2701, 2717.

124. See *id.* at 2712.

125. *Id.* at 2701. See *supra* notes 102, 104 and accompanying text.

126. *Id.* at 2701 n.27. The Court believes this approach is in accord with its "settled policy of avoiding unnecessary decisions of constitutional issues." *Id.*

immunity by relying on those Supreme Court cases which recognized this scope of immunity for governors and cabinet officers.¹²⁷ Justice Powell found these cases to be "inapposite" because "[t]he President's 'unique status' under the Consitution distinguishes him from other executive officials."¹²⁸ This argument simply applies to the President those public policies of unfairness, deterrence, and distraction, which have been traditionally used to justify absolute immunity for judges and prosecutors.¹²⁹ Yet, the argument is persuasive and justifiable when the variety and importance of the President's duties is recognized.¹³⁰

In the majority opinion, Justice Powell stressed that the President's unique status and constitutional responsibilities were factors in support of judicial deference and restraint.¹³¹ In *United States v. Nixon*, the Court recognized that the Presidential evidentiary privilege is "rooted in the separation of powers under the Constitution."¹³² Although the separation of powers doctrine

127. *Id.* at 2702. See, e.g. *Butz v. Economu*, 438 U.S. 478 (1978); *Shuer v. Rhodes*, 416 U.S. 232 (1974).

128. 102 S. Ct. at 2702. Fitzgerald reasoned that while the speech and debate clause provides a textual basis for congressional immunity, the omission of such a textual provision for the President indicates the Framers rejected a similar grant of executive immunity. *Id.* at 2702 n.31. Justice Powell found this argument unpersuasive for several reasons. "First, a specific textual basis has not been considered a prerequisite to the recognition of immunity." *Id.* See, e.g., *Stump v. Sparkman*, 435 U.S. 349 (1978) (absolute immunity of judges recognized although no constitutional provision expressly confers judicial immunity). Second, the Court "has established that absolute immunity may be extended to certain officials of the Executive Branch." 102 S. Ct. at 2702 n.31. See *Butz*, 438 U.S. at 511-12 (absolute immunity recognized for administrative officials engaged in functions analogous to those of judges and prosecutors); *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (extending immunity to prosecutorial officials). Third, historical evidence permits the inference that the "Framers assumed the President's immunity from damages liability." 102 S. Ct. at 2702 n.31. No debates at the Constitutional Convention suggest an expectation that the President would be subjected to the distraction of suits by disappointed private citizens. *Id.* Senator Ellsworth and Vice President John Adams, delegates to the convention, voiced the view that "the President, personally, was not subject to any process whatever . . . For [that] would put it in the power of a common justice to exercise any authority over him, and stop the whole machine of government." *Id.*, (quoting W. MACLAY, JOURNAL OF W. MACLAY 167 (E. Maclay ed. 1890)). Justice Story "held it implicit in the separation of powers that the President must be permitted to discharge his duties undistracted by private lawsuits." 102 S. Ct. at 2702 n.31. See J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1563, at 418-19 (1833 ed.). When Justice Marshall ruled in *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807), that a subpoena duces tecum can be issued to a President, President Thomas Jefferson, in a letter to a prosecutor at the Burr trial, argued that the President was not intended to be subject to judicial process. 102 S. Ct. at 2702 n.31.

129. See *supra* notes 21-26 and accompanying text. See also *Butz*, 438 U.S. at 508-11; *Sparkman*, 435 U.S. at 363-64; *Imbler*, 424 U.S. at 417-20; *Pierson v. Ray*, 386 U.S. 547, 553-55 (1967).

130. See Note, *supra* note 28, at 894-96.

131. 102 S. Ct. at 2703.

132. 418 U.S. at 708.

does not bar every exercise of jurisdiction over the President,¹³³ Justice Powell believed that precedent establishes that a court, before exercising jurisdiction, "must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch."¹³⁴ Acknowledging that the exercise of jurisdiction has been held warranted when judicial action is necessary to serve broad public interests,¹³⁵ or to vindicate the public interest in an ongoing criminal prosecution,¹³⁶ the Court held that the exercise of jurisdiction was unwarranted in the case of a private suit for damages based on the President's official acts.¹³⁷

Because of the special nature of the President's constitutional office and functions, the Court held that the scope of absolute immunity includes acts within the "outer perimeter" of his official responsibility.¹³⁸ Justice Powell argued that application of the

133. See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974); *United States v. Burr*, 25 F. Cas. 187, 191, 196 (C.C.D. Va. 1807).

134. 102 S. Ct. at 2704. See *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977); 418 U.S. at 703-13.

135. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In *Youngstown*, a lawsuit was brought against the Secretary of Commerce to enjoin the seizure of steel mills. The seizure was ordered by President Harry Truman who believed that a pending strike of the mills would hamper the nation's military effort during the Korean conflict. *Id.* at 583. Although the President was not a party in the action, the Supreme Court ruled that the President had impinged on Congress' legislative power and acted beyond his constitutional authority in ordering the seizure. *Id.* at 587-88. Accordingly, the Court affirmed the district court's order to enjoin the Secretary of Commerce from executing the President's order. *Id.* at 583. But see generally *Nixon v. Sirica*, 487 F.2d 700, 709 (D.C. Cir. 1973) (to distinguish *Youngstown* from suit brought directly against President is to exalt form over substance).

136. See *United States v. Nixon*, 418 U.S. 683 (1974).

137. 102 S. Ct. at 2704. Justice Powell emphasizes that the Court has recognized in *United States v. Gillock*, 445 U.S. 360, 371-73 (1980), "that there is a lesser public interest in actions for civil damages than, for example, criminal prosecutions." 102 S. Ct. at 2704 n.37. Also, there is not a remedy in civil damages for every legal wrong under the legal system of the United States. *Id.* The Court's implied-rights-of-action cases establish that in the absence of expressed congressional intent to provide a damages remedy, victims of statutory crimes ordinarily may not sue in federal court. *Id.* See, e.g., *Merrill Lynch, Pierce Fenner & Smith, Inc. v. Curran*, 102 S. Ct. 1825 (1982); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *California v. Sierra Club*, 451 U.S. 287 (1981).

138. 102 S. Ct. at 2705. Justice Powell acknowledges the Court's application of the "functional" approach in previous decisions which limited an official's absolute immunity to acts in performance of particular functions of his office. *Id.* See *Butz*, 438 U.S. at 508-17; *Imbler*, 424 U.S. at 430-31. However, Justice Powell points out that "the Court has refused to draw functional lines finer than history and reason would support." 102 S. Ct. at 2705. See, e.g., *Spalding*, 161 U.S. at 498 (privilege

"function" theory favored by Justice White, which limits an official's absolute immunity to acts in performance of functions of his office to the President, was inappropriate because the President has discretionary responsibilities in a broad variety of areas (many of them highly sensitive) which would necessarily be subjected to highly intrusive inquiries involving his motives.¹³⁹ Fitzgerald argued that Nixon acted outside the outer perimeter of his official duties if he ordered the reorganization in which Fitzgerald lost his job.¹⁴⁰ Justice Powell believed this to be a specious argument since it is clearly within the President's authority to prescribe the manner in which the Secretary will conduct the business of the Air Force.¹⁴¹ Therefore, because the President can prescribe reorganizations and reductions in force, Justice Powell concluded that Nixon's alleged wrongful acts lie "within the outer perimeter" of his authority.¹⁴²

Anticipating criticism, the Court cautioned that a rule of absolute immunity will not place the President above the law.¹⁴³ As the political scandal of Watergate demonstrated, the constitutional remedy of impeachment is an effective check on the most recalcitrant President.¹⁴⁴ Although the content of "high Crimes and Misdemeanors" is uncertain, it is generally accepted that the phrase includes serious constitutional violations.¹⁴⁵ Because his every action is newsworthy, the President is subjected to constant

extends to all matters committed by law to an official's control or supervision); *Barr*, 360 U.S. at 575 ("fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable. . . ."); *Sparkman*, 435 U.S. at 363 & n.12 (judicial privilege applies even to acts occurring outside "the normal attributes of a judicial proceeding").

139. 102 S. Ct. at 2705.

140. *Id.* Fitzgerald based his argument on 5 U.S.C. § 7513(a). *See supra* note 87 and accompanying text. Therefore, arguably no federal official could, within the outer perimeter of his official duties, cause Fitzgerald to be dismissed without satisfying this standard in "prescribed statutory proceedings." 102 S. Ct. at 2705. However, Justice Powell believed that adoption of this construction would deprive absolute immunity of its intended effect by subjecting the President to trial on "virtually every allegation that an action was unlawful, or taken for a forbidden purpose." *Id.*

141. *Id.* *See* 10 U.S.C. § 8012(b) (Supp. 1982).

142. 102 S. Ct. at 2705.

143. *Id.* at 2706 n.41. The checking mechanisms that operate on the President are numerous and varied. *See generally* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 275-95 (1980).

144. *See* U.S. CONST. art. II, § 4. Impeachment is also available to remedy misconduct of federal judges who possess absolute immunity. *See* Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 690-706 (1979). Congressmen may be censured or removed from office by a vote of their colleagues. U.S. CONST. art. I, § 2, cl. 5.

145. *See* Note, *supra* note 28, at 909 nn.232-33. Coincidentally, the articles of impeachment proposed against President Nixon included the offenses at issue in *Halperin v. Kissenger*, 606 F.2d 1192 (D.C. Cir. 1979) and *Clark v. United States*, 481 F. Supp. 1086 (S.D.N.Y. 1979).

scrutiny by the press.¹⁴⁶ Furthermore, in recent years Congress has been increasingly vigilant in overseeing domestic and international acts by the President.¹⁴⁷ Political considerations such as a desire for reelection and his positional status as the leader of his political party encourage good behavior by the President. The President's concern for his historical stature, evidenced by the proliferation of Presidential memoirs, also checks misconduct.¹⁴⁸ Absolute immunity for the President, as for judges and prosecutors, "merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends."¹⁴⁹ Based on its holdings, the Court reversed the decision of the court of appeals and remanded the case for action consistent with its opinion.¹⁵⁰

C. Concurring and Dissenting Opinions

Chief Justice Burger concurred with the majority opinion and wrote separately to emphasize that presidential immunity derives from, and is mandated by, the constitutional doctrine of separation of powers.¹⁵¹ Thus, judicial intrusion through private damage actions would improperly impinge upon and thereby interfere with the independence that is imperative to the functioning of the Presidency.¹⁵² The Chief Justice argued that such an intrusion would frustrate the essential purpose of the separation of powers doctrine which is to allow for independent functioning of each co-equal branch of government within its assigned sphere of responsibility.¹⁵³ Furthermore, exposing the President to civil damages actions for official acts would open the floodgates to litigation, subjecting presidential actions to undue judicial scrutiny and the President to harassment.¹⁵⁴ Echoing the majority's balancing approach,¹⁵⁵ Chief Justice Burger concluded that the needs of a system of government and the need to prevent large scale invasions

146. 102 S. Ct. at 2706.

147. *Id.*

148. *Id.*

149. *Id.* See *supra* notes 21-26 and accompanying text.

150. 102 S. Ct. at 2706.

151. *Id.*

152. *Id.* at 2708.

153. *Id.* at 2707. See *United States v. Nixon*, 418 U.S. 683 (1974); *United States v. Gravel*, 408 U.S. 606 (1972).

154. 102 S. Ct. at 2708.

155. *Id.* at 2704.

of the executive function by the judiciary far outweigh the need to vindicate private claims.¹⁵⁶ Defending against damage suits would divert the President's attention from his executive duties, thereby inhibiting the processes of executive branch decision-making to the detriment of the public interest.¹⁵⁷

In his angry dissent, Justice White argued that abandonment of the function theory by "[a]ttaching absolute immunity to the office of the President, rather than to particular activities that the President might perform, places the President above the law."¹⁵⁸ Characterizing the majority opinion as a rejection of the *Butz v. Economou* holding,¹⁵⁹ Justice White contended that the President, under *Fitzgerald*, enjoys absolute immunity regardless of the damage he inflicts, regardless of how violative of the law and of the Constitution he knew his conduct to be, and regardless of his purpose.¹⁶⁰

Justice White claimed that the majority was mistaken in believing that *Fitzgerald* does no more than extend to the President the same sort of immunity previously recognized with respect to members of Congress, judges, prosecutors, and legislative aides.¹⁶¹ The Justice contended that in no previous case has the Court extended absolute immunity to all actions "within the scope of the official's constitutional and statutory duties."¹⁶² The dissent accused the Court of abandoning the basic principle that the United States is a government of laws, not of men, and that the laws furnish a remedy for the violation of a vested legal right.¹⁶³ According to the dissent, this abandonment is "almost

156. *Id.* at 2706, 2708. The Chief Justice pointed out that in this case Fitzgerald did receive substantial relief through his use of congressionally provided procedures. *Id.* at 2708-09 n.5. The Civil Service Commission ordered him reinstated with backpay. Also, Fitzgerald received a settlement from Nixon. *Id.* See *supra* note 116.

157. 102 S. Ct. at 2709.

158. *Id.* at 2711. Justice White cited the following cases as precedent ignored by the Court: *United States v. Brewster*, 408 U.S. 501 (1972) (members of Congress are not immune if they deliberately violate the law when they importune the executive branch and administrative agencies outside hearing rooms and legislative halls); *United States v. Gravel*, 408 U.S. 606 (1972); (member of Congress or his aide not immune if they burglarize home to secure information deemed relevant to legislative investigation); *Dennis v. Sparks*, 449 U.S. 24 (1980) (judges immune from damages liability only when performing judicial function). Chief Justice Marshall in *Marbury*, 1 U.S. (1 Cranch) at 165, held that "the question, whether the legality of the act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act."

159. See *supra* notes 65-67 and accompanying text.

160. 102 S. Ct. at 2710. White illustrated this argument by citing the *Halperin* case, 452 U.S. 713 (1974). 102 S. Ct. at 2710 n.1.

161. 102 S. Ct. at 2711 n.2.

162. *Id.*

163. *Id.* at 2711. See *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401 (1981)

wholly a policy choice" which is without substantial support and is "ambiguous in its reach and impact."¹⁶⁴

Justice White exposed the weakness of his position by rhetorically exaggerating the arguments of the majority in order to attack them. The Justice contended that if as a matter of constitutional law the President is absolutely immune from civil liability suits, it logically follows that he should be immune from any kind of judicial process.¹⁶⁵ Justice White argued that this cannot be, for it is the rule, not the exception, that executive actions are subject to judicial review.¹⁶⁶ Disregard for public policy considerations was responsible for this faulty line of reasoning.

After considering the federal statutes forming the basis of two of Fitzgerald's causes of action, Justice White concluded that the Court's separation of powers argument lacked credibility.¹⁶⁷ Justice White proposed that by enacting these statutes, Congress intended to ensure the acquisition of information from a "recalcitrant Executive."¹⁶⁸ The personnel decision by which Fitzgerald lost his job was simply not a constitutionally assigned presidential function that can resist interference by either the Supreme Court or Congress.¹⁶⁹ In addition, Justice White argued that the various regulations and statutes protecting civil servants from arbitrary executive action illustrate the public interest in encouraging less vigor and more caution on the part of decisionmakers.¹⁷⁰

Justice White concluded his dissent by incorrectly isolating the contentions by which the majority opinion rationalized its holding.¹⁷¹ The first contention of the majority, in Justice White's opinion, was that the President occupies a "unique position in the

(Burger, C.J., dissenting); *Schuer v. Rhodes*, 416 U.S. 232 (1974) (governor of state entitled only to qualified immunity); *McGautha v. California*, 402 U.S. 183 (1971) (Brennan, J., dissenting); *Marbury*, 1 U.S. at 163.

164. 102 S. Ct. at 2712.

165. *Id.* Under the Constitution, impeachment shall not bar "Indictment, Trial, Judgment and Punishment, according to Law." U.S. CONST. art. I, § 3, cl. 7.

166. 102 S. Ct. at 2718. Case law established that the separation of powers doctrine does not insulate presidential action from judicial review or judicial process. See, e.g., *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Korematsu v. United States*, 323 U.S. 214 (1944); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

167. 102 S. Ct. at 2720.

168. *Id.* at 2721.

169. *Id.* See 5 U.S.C. §§ 3501-3502 (Supp. 1982).

170. 102 S. Ct. at 2721-22.

171. *Id.* at 2725-26.

constitutional scheme.”¹⁷² Conceding that the President’s unique role may encompass functions permitting a claim of absolute immunity, Justice White believed that the Court went too far by holding that he is entitled to absolute immunity in general and in this particular case.¹⁷³ In arguing for a more limited approach, the Justice simply reiterated his functional theory.¹⁷⁴ Justice White believed that the second contention of the majority is that the President’s “visibility” makes him particularly vulnerable to suits for civil damages.¹⁷⁵ This argument is undermined by the lack of numerous civil suits against the President in the historical record.¹⁷⁶ Finally, the majority suggested that potential liability could frequently distract a President from his public duties.¹⁷⁷ Justice White failed to recognize the similarity between this argument and the previous one he identified. Each is a single branch of the Court’s public policy argument. Nonetheless, Justice White challenged this argument by noting that “the majority nowhere suggests a particular disadvantageous effect on a specific presidential function.”¹⁷⁸

Justice Blackmun, in his separate dissenting opinion, emphasized his concern with the Court’s failure to answer Justice White’s “unanswerable” argument that no man, not even the President, is absolutely and fully above the law.¹⁷⁹ Furthermore, Justice Blackmun found a contradiction in the Court’s position that the President may nevertheless be fully subject to congressionally created forms of liability.¹⁸⁰

V. EVALUATION OF THE SUPREME COURT’S DECISION

The arguments of Justice Powell in *Nixon v. Fitzgerald* are valid and provide persuasive support for the Court’s determination of the scope of immunity available to the President. This decision, along with the Court’s holding in the companion case of *Harlow v. Fitzgerald*,¹⁸¹ has correctly established a clear distinc-

172. *Id.* at 2725.

173. *Id.*

174. *See supra* note 158 and accompanying text.

175. 102 S. Ct. at 2725.

176. *Id.* *See id.* at 2703 n.33.

177. *Id.* at 2726.

178. *Id.*

179. *Id.* *See* *United States v. Lee*, 106 U.S. 196, 220 (1881); *Marbury*, 1 U.S. at 163.

180. 102 S. Ct. at 2726-27.

181. 102 S. Ct. 2727 (1982). In *Harlow*, defendants Bryce Harlow and Alexander Butterfield, independent of Nixon, appealed the denial of their claim of absolute immunity. *Id.* at 2732. *See supra* note 100-04 and accompanying text. The Supreme Court granted certiorari to decide “the scope of immunity available to the senior aides and advisers of the President in a lawsuit for damages based

tion between the absolute immunity afforded the President and the qualified immunity available to other federal executive officials.

Justice Powell argued that, analogous to prosecutors and judges, considerations of public policy require the application of absolute immunity to the President.¹⁸² The author believes that recognition of the President's unique status under the Constitution compels this conclusion. Like prosecutors and judges, the President has the duty to make countless discretionary decisions. Subjecting him to damage liability for errors of judgment made in good faith would be patently unfair. The President is similarly situated in a highly visible office taking action which affects countless people. Concern with the possibility of civil litigation would be a distraction to the President in the performance of his duties, possibly causing hesitating and cowardly decisionmaking.

Justice White correctly pointed out that since the *Bivens* cause of action became available in 1971 only a handful of suits have been brought against the President.¹⁸³ However, it would be wrong to ignore the impact that a contrary ruling in *Fitzgerald* might have had on the frequency of such lawsuits. Concern for such public policies has been the Court's traditional approach in its determination of immunity available to government officials.¹⁸⁴

The confusion of lower federal courts implies that Justice Powell's reasoning in *Fitzgerald* is correct. In *Halperin v. Kissinger* and *Clark v. United States*, the office of the President was analogized to that of governors and cabinet officers who are afforded only qualified immunity.¹⁸⁵ This analogy is appealing but obviously inappropriate since the President has a different constitutional status. While a governor's responsibilities are narrow and limited to his state, the President has broad responsibilities of domestic and international dimension. Although cabinet officers are members of the executive branch, the Constitution vests the ex-

upon their official acts." 102 S. Ct. at 2730. The Court held that presidential aides are entitled to only qualified immunity. 102 S. Ct. at 2734. However, the standard of immunity permits defeat of insubstantial claims without resort to trial. *Id.* at 2736.

182. 102 S. Ct. at 2703. See *supra* notes 127-29 and accompanying text.

183. 102 S. Ct. at 2725. See *supra* note 176.

184. See *supra* note 21 and accompanying text.

185. See 606 F.2d 1192; 481 F. Supp. 1086.

ecutive power in the President alone.¹⁸⁶ Consequently, any inhibition of the President's performance has far greater repercussions on the national interest.

The primary objection of Justice White to the *Fitzgerald* holding was not the granting of absolute immunity to the President, but rather the perceived abandonment by the Court of the traditional functional approach to immunity exemplified by *Butz*.¹⁸⁷ Arguing rhetorically, Justice White contended that attaching absolute immunity to the office of the President placed the President above the law.¹⁸⁸ However, *Fitzgerald* does not constitute an abandonment of *Butz*. The opinion of Justice Powell in *Harlow* clearly indicates that the Court considers *Butz* to be good law.¹⁸⁹ The Court in *Fitzgerald* simply concludes that, based on the special nature of the President's constitutional office and functions, *Butz* is inapplicable to the President.

Recognition of the constitutional concept of separation of powers also establishes the accuracy of the Court's position. Application of the *Butz* functional approach would require a judicial determination of those functions which are entitled to absolute immunity. Since the President has discretionary responsibilities in a broad range of areas, "it would be difficult to determine which of the President's countless 'functions' encompassed a particular action."¹⁹⁰ Also, judicial inquiries into the President's motives would often be necessary under the functional theory and could be highly intrusive.¹⁹¹

Previous decisions by the Court establish that neither subjecting presidential actions to a judicial determination of their constitutionality nor subjecting the President to judicial process violates the separation of powers doctrine.¹⁹² Amenability to the judicial process, however, does not predicate amenability to all judicial remedies. The *Fitzgerald* holding simply precludes the remedy of damages against the President. This reasoning is not refuted by reliance on *Marbury v. Madison* for the proposition that individuals have the right to claim the protection of the laws for an injury.¹⁹³ The fact that *Marbury* lost his case in the Supreme Court suggests that *Marbury* does not establish that the protection afforded by the law must be in the form of a particular

186. See U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

187. See *supra* note 67 and accompanying text.

188. 102 S. Ct. at 2710. See *supra* notes 158-60 and accompanying text.

189. See *Harlow*, 102 S. Ct. at 2734.

190. See *Fitzgerald*, 102 S. Ct. at 2705.

191. *Id.*

192. See *supra* note 166 and accompanying text.

193. 102 S. Ct. at 2704-05 n.37. See *Marbury*, 1 U.S. at 163.

remedy.¹⁹⁴

Justice Powell correctly concluded that the *Fitzgerald* holding does not place the President above the law.¹⁹⁵ The checks on presidential misconduct are numerous and varied.¹⁹⁶ They are sufficient to both deter and penalize the President for committing illegal and unconstitutional acts. Interestingly, Justice White made no attack on the absolute immunity afforded to judges and prosecutors. An estimated 75,000 public officials have absolute immunity from civil damage suits for acts within the scope of their official functions.¹⁹⁷ The checks on these officials are less than those imposed on the President. If granting absolute immunity is dangerous to the public interest, it is difficult to equate the danger presented by one President to that posed by 75,000 unrestrained public officials.

VI. IMPACT

A broad interpretation of *Nixon v. Fitzgerald* makes it difficult to predict how the Supreme Court will decide future immunity cases. From *Scheuer v. Rhodes* to *Butz v. Economou*, only qualified immunity was afforded to executive officials unless they performed functions similar to those of judges and prosecutors.¹⁹⁸ The public policies traditionally considered in immunity cases did not dissuade the Court from its conclusion that qualified immunity is sufficient protection for most executive officials. In *Fitzgerald*, however, these same policy considerations, in conjunction with recognition of the President's unique status, compelled the Court to make available absolute immunity. This decision was undoubtedly correct,¹⁹⁹ yet it suggests that future decisions will vary according to the Court's determination of the weight and merit these policies have in relation to the circumstances of each case. Thus, the *Fitzgerald* decision may exemplify a sliding scale approach which will be used in future immunity cases.

If the reasoning in *Fitzgerald* is interpreted narrowly as applying only to the President, then its probable impact on future decisions will be minor. It is unlikely that the Court will equate other

194. 102 S. Ct. at 2704-05 n.37.

195. *Id.* at 2706.

196. *See supra* notes 144-48 and accompanying text.

197. *See* 102 S. Ct. at 2707 n.2.

198. *See supra* notes 56-67 and accompanying text.

199. *See supra* notes 181-97 and accompanying text.

executive officials to the President in a manner compelling similar treatment. Future decisions will not emphasize the official's status to the extent *Fitzgerald* did. Instead, whether particular officials perform functions analogous to those of judges and prosecutors will be the key determination in the Court's analysis. Significantly, the Court's reasoning in *Harlow v. Fitzgerald* is reminiscent of that exemplified by the *Scheuer-Butz* line of cases.²⁰⁰

Perhaps the significance of *Fitzgerald* is not its value as judicial precedent, but rather is the general, practical impact it will have. The *Fitzgerald* holding may be the impetus necessary to amend the Federal Tort Claims Act (FTCA).²⁰¹ One scholar has suggested that Congress might expand the FTCA to include a federal rule of decision for constitutional torts.²⁰² Such an amendment would permit the waiving of sovereign immunity in *Bivens*-type suits and shift liability for constitutional torts from officials to the United States.²⁰³ Thus, a citizen with a claim against the President could instead sue the federal government and be assured of having a defendant with deep pockets. Interestingly, at least eighteen states currently provide some form of indemnification for public officials sued for acts done in their official capacity.²⁰⁴ This suggests that amending the FTCA is the correct approach. Furthermore, exposing the United States to liability would remove most of the extraneous obstructions to recovery in meritorious suits.²⁰⁵

Another effect of *Fitzgerald* may be an increase in suits against federal officials who only have available qualified immunity. It is generally accepted that violations of constitutional rights are considered tortious offenses,²⁰⁶ and it is established law that

200. See *Harlow*, 102 S. Ct. at 2727. See also *supra* notes 56-67 and accompanying text.

201. See Federal Tort Claims Act of 1946, 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2678, 2680 (1976). See generally G. Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 HARV. J. ON LEGIS. 1 (1979); Engdahl, *supra* note 35.

202. Note, "Damages or Nothing"-The Efficacy of the *Bivens*-Type Remedy, 64 CORNELL L. REV. 667, 700 (1979). The FTCA waived the sovereign immunity of the United States only for torts committed by federal employees within the scope of their employment and only in those circumstances where a private person would be liable under state law. Bell, *supra* note 201, at 4. See 28 U.S.C. § 1346(b). Pursuant to the FTCA, the federal government is not liable for constitutional torts arising under federal law and therefore retains its immunity. Bell, *supra* note 201, at 4. See *Birnbaum v. United States*, 588 F.2d 319, 322 (2d Cir. 1978).

203. Comment, *supra* note 202, at 699.

204. For a list of the states and statutes, see Freed, *supra* note 17, at 564-65 n.182.

205. See Note, *supra* note 202, at 697-98.

206. See *Pierson*, 386 U.S. at 556 (quoting *Monroe v. Pape*, 365 U.S. 167, 187

tortfeasors are jointly and severally liable.²⁰⁷ Because of the very nature of the President's duties, he rarely acts alone. Cabinet officers and presidential aides are extensively utilized to execute presidential directives. Therefore, even though suits against the President are barred by absolute immunity, there will usually be other culpable defendants available.

Subjecting lower federal officials to the increased risk of liability may also act as an indirect check on presidential misconduct. In the past, such officials were unconcerned with the possibility of damages liability because they assumed they were under the President's umbrella of immunity. Now, the *Fitzgerald* holding, in conjunction with *Butz* and *Harlow*, clearly establishes that absolute immunity is available only to the President.²⁰⁸ Therefore, in those situations where the lower-level official receives a presidential order which he clearly recognizes is illegal or unconstitutional, he will be inclined to refuse or resist executing the order to protect himself. The holding in *Wood v. Strickland* establishes that the qualified immunity available to lower-level officials is dependent on a subjective and objective evaluation of his good faith.²⁰⁹ In the future, presidential misconduct may be limited by the increased scrutiny of his directives by his own subordinates.

Since damage liability is no longer available against the President, there may be an increase in the use of other judicial remedies not foreclosed by *Fitzgerald*. It is accepted that the President is subject to judicial process granting prospective relief in the form of writs of mandamus and injunctions.²¹⁰ Mandamus would lie whenever the President refused or failed to perform an affirmative duty imposed by law.²¹¹ Such suits may be easily resolved on summary motions since the only factual issue is whether the President performed the duty.²¹² However, since violations of constitutional rights are seldom negative acts, the writ of mandamus would often be inapplicable. Consequently, injunc-

(1961)). See generally Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U.L. REV. 277 (1965).

207. See W. Prosser, *LAW OF TORTS*, 297-99 (4th ed. 1971).

208. See *supra* note 181 and accompanying text.

209. See *Wood*, 420 U.S. at 315-22.

210. See *supra* note 192 and accompanying text.

211. See *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 603 (D.C. Cir. 1974) (mandamus lies against the President for non-performance of affirmative statutory duties).

212. See, e.g., *Holmes v. United States Bd. of Parole*, 541 F.2d 1243 (7th Cir. 1976) (summary judgment for plaintiff on mandamus issue upheld).

tions may often be the more desirable remedy and more frequently used.

VII. CONCLUSION

The Supreme Court in *Nixon v. Fitzgerald* has established as a clear precedent that a President is entitled to absolute immunity from damages liability predicated on his official acts. In so doing, the Court has not placed the President above the law. There exist adequate safeguards protecting citizens from unnecessary violations of their rights. The Supreme Court has simply made the decision that violations of such individual rights may be outweighed by the general public interest. When such is the case, the President should not be faced with numerous lawsuits in his attempt to carry out his official duties.

It is unlikely that this nation will ever again be forced to endure the excesses of a President such as Richard Nixon. Yet, his experience serves to remind future Presidents that, notwithstanding absolute immunity from damages liability, the President is subject to the Constitution and the laws of the United States.

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