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Constitutional Law—Presidential Immunity—The President Is Absolutely Immune From Civil Damages Liability For Acts Done Within The “Outer Perimeter” Of His Official Capacity (Casenote)

Laura H. Burney

St. Mary's University School of Law, lburney@stmarytx.edu

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CASENOTE

CONSTITUTIONAL LAW—Presidential Immunity—The President Is Absolutely Immune From Civil Damages Liability For Acts Done Within The “Outer Perimeter” Of His Official Capacity.

Nixon v. Fitzgerald,
— U.S. —, 102 S. Ct. 2690, 73 L. Ed. 2d 349 (1982).

In 1970, A. Ernest Fitzgerald's job as a management analyst with the Department of the Air Force was eliminated as a result of a departmental reorganization.¹ When he was not reassigned to another federal position,² Fitzgerald filed a complaint with the Civil Service Commission alleging that his removal constituted retaliation for his testimony before a congressional committee in which he divulged large cost-overruns and other difficulties with a Department of Defense project.³ The Commission disagreed with Fitzgerald's allegations⁴ but held that his removal was a violation of certain civil service regulations,⁵ recommended that he be reinstated or reassigned, and ordered payment of lost compensation.⁶ After

1. *Nixon v. Fitzgerald*, — U.S. —, —, 102 S. Ct. 2690, 2693, 73 L. Ed. 2d 349, 353 (1982).

2. *See id.* at —, 102 S. Ct. at 2695, 73 L. Ed. 2d at 355. President Nixon asked White House Chief of Staff H. R. Haldeman to have Fitzgerald reassigned to another position in the administration after public hearings were convened by the Subcommittee on Economy in Government regarding Fitzgerald's dismissal and after the press had queried the President about the situation. *Id.* at —, 102 S. Ct. at 2694 n.1, 73 L. Ed. 2d at 354. There was strong resistance, however, to the reassignment within the administration, particularly by White House aide Alexander Butterfield, who circulated a memo stating that Fitzgerald was disloyal and recommending that “we should let him bleed for awhile at least.” *Id.* at —, 102 S. Ct. at 2694-95, 73 L. Ed. 2d at 354-55.

3. *See id.* at —, 102 S. Ct. at 2694-95, 73 L. Ed. 2d at 354-55. It was not disputed that Fitzgerald's testimony humiliated and angered Department of Defense officials. *See id.* at —, 102 S. Ct. at 2694 n.1, 73 L. Ed. 2d at 354 n.1.

4. *See id.* at —, 102 S. Ct. at 2696, 73 L. Ed. 2d at 356-57.

5. *See id.* at —, 102 S. Ct. at 2695-96, 73 L. Ed. 2d at 356. The examiner held that 5 C.F.R. § 752 barred the use of a “reduction in force” to move Fitzgerald “for reasons purely personal to him.” *Id.* at —, 102 S. Ct. at 2696 n.16, 73 L. Ed. 2d at 356 n.16.

6. *See id.* at —, 102 S. Ct. at 2696 n.17, 73 L. Ed. 2d at 356 n.17. Prior to rendering its

this decision, Fitzgerald filed a suit for damages in the United States District Court.⁷ President Nixon, however, was not named as a defendant until 1978 in a second amended complaint.⁸ The district court denied a motion for summary judgment⁹ and rejected Nixon's claim of "absolute presidential immunity."¹⁰ Nixon pursued a collateral appeal in the court of appeals which was summarily dismissed for lack of jurisdiction.¹¹ The United States Supreme Court granted certiorari to decide the scope of presidential immunity.¹² Held—*Reversed and remanded*. The President

final decision of September 18, 1973, the Commission conducted public hearings which attracted fervent publicity primarily due to Air Force Secretary Robert Seaman's testimony. *Id.* at ___, 102 S. Ct. at 2695, 73 L. Ed. 2d at 355. Although the Secretary refused to be specific, he did testify that the White House had given him "some advice" before Fitzgerald's position was eliminated. When asked about the Secretary's testimony at a news conference, President Nixon stated that he had approved Fitzgerald's removal. *Id.* at ___, 102 S. Ct. at 2695, 73 L. Ed. 2d at 355. Hours after the conference Nixon privately told presidential aide Charles Colson that he had ordered the firing. *Id.* at ___, 102 S. Ct. at 2695 n.13, 73 L. Ed. 2d at 355 n.13. The next day, however, the White House retracted the President's statement and asserted that Nixon had not approved the dismissal. *See id.* at ___, 102 S. Ct. at 2695, 73 L. Ed. 2d at 356.

7. *See id.* at ___, 102 S. Ct. at 2696, 73 L. Ed. 2d at 357. The suit, which raised claims similar to those alleged in the complaint filed with the Civil Service Commission, named eight Defense Department officials, White House aide Alexander Butterfield, and other unnamed aides as defendants. *Id.* at ___, 102 S. Ct. at 2696, 73 L. Ed. 2d at 357.

8. *See id.* at ___, 102 S. Ct. at 2697, 73 L. Ed. 2d at 357. The district court dismissed the original complaint holding that it was barred by a three-year statute of limitations. *See Fitzgerald v. Seamans*, 384 F. Supp. 688, 698 (D.D.C. 1974), *modified*, 553 F.2d 220 (D.C. Cir. 1977). The appellate court affirmed except as to Butterfield since his involvement was unknown until after the memo he circulated in 1973. *See Fitzgerald v. Seamans*, 553 F.2d 220, 229, 231 (D.C. Cir. 1977). Following remand by the appellate court, Fitzgerald filed the second amended complaint. Although this complaint also named several other officials, by March 1980 only Richard Nixon and White House aides Bryce Harlow and Alexander Butterfield remained. *See Nixon v. Fitzgerald*, ___ U.S. ___, ___, 102 S. Ct. 2690, 2697, 73 L. Ed. 2d 349, 357 (1982).

9. *See id.* at ___, 102 S. Ct. at 2697, 73 L. Ed. 2d at 357. The Court ruled that Fitzgerald had triable causes of action under 5 U.S.C. § 7211 (Supp. III 1979) which provides that an employee's right to testify before a House Committee cannot be obstructed, and 18 U.S.C. § 1505 (Supp. V 1981), which makes obstructions of congressional testimony a crime. *See id.* at ___, 102 S. Ct. at 2697 n.20, 73 L. Ed. 2d at 357 n.20 (1982). The district court also ruled that Fitzgerald had a cause of action under the first amendment. *See id.* at ___, 102 S.Ct. at 2697, 73 L. Ed. 2d at 357.

10. *Id.* at ___, 102 S. Ct. at 2697, 73 L. Ed. 2d at 358.

11. *See id.* at ___, 102 S. Ct. at 2697-98, 73 L. Ed. 2d at 358.

12. *Nixon v. Fitzgerald*, 452 U.S. 959 (1981). The United States Supreme Court did affirm, by an equally divided court with Justice Rehnquist not participating, a part of a court of appeals decision which rejected presidential immunity. *See Halperin v. Kissinger*, 606 F.2d 1192, 1212 (D.C. Cir. 1979), *aff'd in part and dismissed in part*, 452 U.S. 713 (1981) (Court affirmed regarding Nixon, Kissinger, and Mitchell, and dismissed regarding Haldeman). The instant case represents the first time the Supreme Court has directly ad-

is absolutely immune from civil damages liability for acts done within the "outer perimeter" of his official capacity.¹³

The concept of immunity for various government officials emanates from common law, the Federal Constitution, and case law.¹⁴ From common law, judges have acquired absolute immunity from civil suits based on their official acts regardless of malicious motives or a clear absence of actual jurisdiction.¹⁵ The rule is designed to protect the public interest¹⁶ and to maintain the independence of the judiciary.¹⁷ For the same reasons, absolute immunity has been extended to quasi-judicial officials such as grand and petit jurors¹⁸ and prosecutors.¹⁹ Whereas judges have acquired their immunity from the common law, federal legislators have a constitutional basis for absolute immunity from civil damages in the Speech or Debate Clause.²⁰ The clause has been broadly construed to pro-

dressed the issue.

13. See *Nixon v. Fitzgerald*, ___ U.S. ___, ___, 102 S. Ct. 2690, 2705, 73 L. Ed. 2d 349, 367 (1982).

14. See, e.g., *Tenney v. Brandhove*, 341 U.S. 367, 373, 376 (1951) (immunity of state legislators held co-extensive with that of federal legislators); *Kilbourn v. Thompson*, 103 U.S. 168, 201-04 (1880) (Speech or Debate Clause in Constitution reflects parliamentary privilege); *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 536 (1868) (immunity for judges recognized for centuries in England).

15. See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 350-51 (1871). The immunity prevails as long as there is "potential" jurisdiction. Only when a judge is clearly without jurisdiction over the subject matter does the immunity dissolve. See *id.* at 350-51.

16. See *Spalding v. Vilas*, 161 U.S. 483, 495 (1896) (public interest served by independent judiciary acting without fear of retribution).

17. See, e.g., *Butz v. Economou*, 438 U.S. 478, 512 (1978) (immunity required to insure judges can function "without harassment or intimidation"); *Stump v. Sparkman*, 435 U.S. 349, 363 (1978) (judge should be free to act on own convictions without fear of consequences); *Pierson v. Ray*, 386 U.S. 547, 554 (1967) (judge should not have to fear retribution from "unsatisfied litigants"); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871) (liability to aggrieved litigants would destroy independence of judiciary without which it is neither respectable nor useful). For a frequently cited list of nine reasons which justify absolute judicial immunity, see Jennings, *Tort Liability Of Administrative Officers*, 21 MINN. L. REV. 263, 271-72 (1937).

18. See Engdahl, *Immunity And Accountability For Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 46 (1972). Immunity has been considered imperative for several participants in judicial proceedings. See *Spalding v. Vilas*, 161 U.S. 483, 496 (1896). "No judge, no jury, nor witness, . . . 'could discharge his duty freely if not protected by a positive rule of law from being harassed by actions in respect of the mode in which he did the duty imposed upon him . . .'" *Id.* at 496 (citation omitted).

19. See *Imbler v. Pachtman*, 424 U.S. 409, 422-25 (1976); *Yaselli v. Goff*, 12 F.2d 396, 402 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927). Again, the immunity for these officials only extends to their official acts. See *Imbler v. Pachtman*, 424 U.S. 409, 423 (1976).

20. See U.S. CONST. art. I, § 6, cl. 1. The Speech or Debate Clause provides: "[Senators and Representatives] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses,

tect Congress from unwarranted interference in the execution of its functions.²¹ In extending the immunity to state legislators, the Supreme Court stressed that "[l]egislators are immune . . . not for their private indulgence but for the public good."²²

While protecting the public good is considered one attribute of the Speech or Debate Clause,²³ its primary purpose was to incorporate the doctrine of separation of powers into the Constitution.²⁴ Heavily influenced by the views of Montesquieu,²⁵ the Framers viewed separation of powers as an indelible means of preventing a resurgence of the tyranny they had once fled;²⁶ thus, the legislative, judicial, and executive powers were vested in three separate branches of the government.²⁷ Each branch is to be "largely separate from one another,"²⁸ yet it was recognized early that some degree of interdependence is necessary to insure that "ambi-

and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place." *Id.* § 6, cl. 1.

21. See *Gravel v. United States*, 408 U.S. 606, 618 (1972); Levi, *Some Aspects Of Separation Of Powers*, 76 COLUM. L. REV. 371, 383 (1976). The clause has been construed to provide two different privileges. First, it protects members of Congress from civil arrest while attending or traveling to and from Congress; however, this protection does not render members immune from criminal arrest or civil process. Second, legislators are absolutely immune from civil or criminal suit and arrest or process with respect to legislative acts. See *Gravel v. United States*, 408 U.S. 606, 614-16 (1972).

22. *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

23. See *id.* at 377.

24. See, e.g., *Gravel v. United States*, 408 U.S. 606, 616 (1972) (clause designed to assure freedom of coequal branch); *United States v. Johnson*, 383 U.S. 169, 182 (1966) (primary thrust of clause is separation of powers); *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) (courts should not interfere with legislative committee's investigation absent clear usurpation of judicial or executive functions).

25. See Sharp, *The Classical American Doctrine of "The Separation Of Powers,"* 2 U. CHI. L. REV. 385, 419 (1935). Montesquieu espoused his theory of separation of powers in *The Spirit of the Laws*. See MONTESQUIEU, *THE SPIRIT OF THE LAWS* (D. Carrithers ed. 1977). Montesquieu has been referred to as the "high priest of separation of powers." R. BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 3 (1974).

26. See *Buckley v. Valeo*, 424 U.S. 1, 120-21 (1976); Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385, 385 (1935). Madison advocated Montesquieu's maxim in the Federalist Papers: "'When the legislative and executive powers are united in the same person or body,' says he, 'there can be no liberty . . .'" THE FEDERALIST No. 47 (J. Madison), quoted in *Buckley v. Valeo*, 424 U.S. 1, 120 (1976).

27. See U.S. CONST. arts. I-III.

28. *Buckley v. Valeo*, 424 U.S. 1, 120 (1976); accord *Kilbourn v. Thompson*, 103 U.S. 168, 190-91 (1880) (each branch limited "by the law of its creation" to powers appropriate to it); see also Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 689 (1978). The author refers to the three branch independence as the "hydraulic model" in which "[t]he fluid nature and scope of each branch's functions expand to fit circumstances until they reach the limit set by a competing branch's function." *Id.* at 689.

tion [could] be made to counter-act ambition."²⁹ Although the principle of separation of powers counseled a form of government which has existed for over two hundred years, it has not assumed the status of a settled rule or an infallible formula.³⁰ Consequently, theories concerning its application have varied.³¹ The Supreme Court itself has admitted that separation of powers questions are not resolved according to fixed legal rules, but "according to common sense and the inherent necessities of the governmental co-ordination."³² Recently, however, the Court has adhered to a balancing analysis which requires determining the extent to which the act of one branch prevents another "from accomplishing its constitutionally assigned functions."³³

In *Halperin v. Kissinger*,³⁴ a federal court of appeals determined that separation of powers does not dictate that the President receive absolute immunity from civil damages suits.³⁵ The court concluded that there is no basis for distinguishing between the President and other high executive officials³⁶ who were given only qualified immunity in a 1979 case, *Butz v. Economou*.³⁷ The qualified immunity test, which was first applied to state

29. THE FEDERALIST No. 51, at 344 (J. Madison) (J. Cooke ed. 1961). Madison believed that "blending" was essential for the efficient operation of government. See Sharp, *The Classical American Doctrine Of "The Separation of Powers,"* 2 U. CHI. L. REV. 385, 407 (1935). "Blending" is synonymous with the principle of checks and balances which the Framers also injected into the Constitution. See Note, *Presidential Immunity From Constitutional Damage Liability*, 60 B.U.L. REV. 879, 900-01 (1980). See generally M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 13-18 (1967).

30. See Larnaude, *Separation of Powers*, in 7 CONGRESS OF ART AND SCIENCE 613 (1904), quoted in Frankfurter and Landis, *Power Of Congress Over Procedure In Criminal Contempts In "Inferior" Federal Courts—A Study In Separation Of Powers*, 37 HARV. L. REV. 1010, 1014 (1924).

31. Compare *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (extent of presidential powers fluctuates "depending upon their disjunction or conjunction with those of Congress") with *Myers v. United States*, 272 U.S. 52, 117 (1926) (if presidential function is "essential," no other branch may intrude). For a review and criticism of the different methods the Court has employed in analyzing separation of powers questions, see Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 688-97 (1978).

32. *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928).

33. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977); accord *United States v. Nixon*, 418 U.S. 683, 711-12 (1974).

34. 606 F.2d 1192 (D.C. Cir. 1979), *aff'd in part and dismissed in part*, 452 U.S. 713 (1981) (court affirmed regarding Nixon, Kissinger, and Mitchell and dismissed regarding Haldeman).

35. See *id.* at 1211-12.

36. See *id.* at 1210-11.

37. 438 U.S. 478 (1978). In another recent Supreme Court case, senior aides and advisors of the President were accorded qualified, rather than absolute, immunity. See *Harlow v. Fitzgerald*, — U.S. —, 102 S.Ct. 2727, 2734, 73 L. Ed. 2d 396, 405 (1982).

officials,³⁸ involves both an objective and subjective standard of good faith.³⁹ The objective standard requires a finding that the actor violated a constitutional right of which he knew or should have known.⁴⁰ Under the subjective standard, liability is imposed when an official acts with "the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff]."⁴¹ If either the subjective or objective test is satisfied, the official's immunity is defeated.⁴² The scope of qualified immunity, however, will vary depending on the range of discretion and responsibilities incumbent on the office.⁴³

Although executive immunity has been recognized since 1845,⁴⁴ in *Butz* the Supreme Court concluded that two of the leading cases on the sub-

38. See, e.g., *Procunier v. Navarette*, 434 U.S. 555, 561 (1978) (prison administrators adequately protected by qualified immunity); *Wood v. Strickland*, 420 U.S. 308, 321-22 (1975) (school administrator entitled to qualified immunity); *Scheuer v. Rhodes*, 416 U.S. 232, 242, 247 (1974) (governor and other state official given qualified immunity). All of these cases involved actions brought under 42 U.S.C. § 1983, which permits individuals to sue state officials when they are deprived of their constitutional rights under color of state law. See 42 U.S.C. § 1983 (1976 & Supp. IV 1980).

39. See *Wood v. Strickland*, 420 U.S. 308, 318 (1975); Note, *Presidential Immunity from Constitutional Damages Liability*, 60 B.U.L. Rev. 879, 887 (1980).

40. See, e.g., *Procunier v. Navarette*, 434 U.S. 555, 562 (1978) (qualified immunity unavailable to prison official if knew or should have known constitutional rights infringed); *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975) (hospital superintendent not entitled to immunity if knew or should have known about violation of mental patient's constitutional rights); *Wood v. Strickland*, 420 U.S. 308, 322 (1975) (school board member not immune if knew or should have known student's constitutional rights violated).

41. *Wood v. Strickland*, 420 U.S. 308, 322 (1975). The Supreme Court has adopted the definition of intent found in the Restatement (Second) of Torts § 8A (1965) which contemplates that an actor intends the natural consequences of his acts. See *Procunier v. Navarette*, 434 U.S. 555, 566 (1978).

42. See *Halperin v. Kissinger*, 606 F.2d 1192, 1209 (D.C. Cir. 1979), *aff'd in part and dismissed in part*, 452 U.S. 713 (1981).

43. See *Scheurer v. Rhodes*, 416 U.S. 232, 247 (1974).

44. See *Kendall v. Stokes*, 44 U.S. (3 How.) 87, 98 (1845) (United States Postmaster General not liable in damages for erroneous exercise in judgment); *Developments In The Law—Remedies Against The United States And Its Officials*, 70 HARV. L. REV. 827, 834 (1957). But see Engdahl, *Immunity And Accountability For Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 48 (1972). The author recognizes that *Kendall* has been relied upon in modern opinions as establishing immunity for executive officials charged with discretion but contends that the case is not supportive of such a rule. See *id.* at 48. Engdahl suggests that absolute immunity would be inconsistent with the principles Justice Story pronounced at that time in his *Commentaries on Agency* and with early nineteenth century cases. All of these authorities held that not only must there have been actual authority for the act, but there is also no immunity when an official exceeds the bounds of his authority or when a positive tort results. The author does, however, point out that Justice Story joined the opinion in *Kendall* and that there was a pro-immunity shift in Supreme Court decisions after the Civil War. See *id.* at 21, 41, 48.

ject, *Spalding v. Vilas*⁴⁵ and *Barr v. Matteo*,⁴⁶ were not controlling.⁴⁷ *Spalding* held that the Postmaster General was absolutely immune from damages liability based on acts which had "more or less connection with" matters within his authority.⁴⁸ In *Barr*, an acting director of an executive agency was accorded absolute immunity from a defamation suit based on an act which was within the "outer perimeter" of his authority.⁴⁹ The majority in *Butz* distinguished these cases on the ground that while they involved common law causes of action, the case before them involved a constitutional cause of action.⁵⁰

Halperin also involved a constitutional cause of action;⁵¹ therefore, the appellate court turned to both the Constitution and the commentary of

45. 161 U.S. 483 (1896).

46. 360 U.S. 564 (1959).

47. See *Butz v. Economou*, 438 U.S. 478, 493-95 (1978).

48. *Spalding v. Vilas*, 161 U.S. 483, 498 (1896). In that case the Postmaster General of the United States circulated a memo informing post office personnel that an act of Congress had provided for salary adjustments in which no attorneys' fees were necessary. The plaintiff, the attorney who represented claimants under the act, alleged that the circular was intended to deceive his clients and thereby deprive him of fees; the attorney also sought damages for defamation of character. See *id.* at 487-98. In affirming a judgment for the defendant, the Supreme Court drew heavily upon judicial immunity cases and opined that "the same general considerations of public policy and convenience" which require immunity from civil suits for damages arising from acts done in the course of official actions applies to heads of executive departments. *Id.* at 498.

49. See *Barr v. Matteo*, 360 U.S. 564, 575 (1959). In *Barr*, a press release was circulated which announced the agency director's intention to suspend respondents for supporting a plan which contravened agency policy. See *id.* at 565-66. The Court held that in light of the broad discretion vested in the director, it would be overly restrictive to hold that the statement was not released in the line of duty. See *id.* at 575.

50. See *Butz v. Economou*, 438 U.S. 478, 489, 493-95 (1978). The constitutional cause of action was established in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens* provided that a citizen who suffers a compensable injury to a constitutionally protected interest can invoke the general federal question jurisdiction of the federal courts and bring a suit for damages. See *id.* at 395-96. While *Bivens* dealt only with a fourth amendment right, subsequent cases have extended the constitutional cause of action to other constitutional rights. See *Davis v. Passman*, 442 U.S. 228, 242 (1979). In *Davis*, the Supreme Court also added that such a damage remedy will not be available when "special factors" are present which would counsel hesitation and concluded that a suit against a Congressman for alleged unconstitutional violations does counsel hesitation. *Id.* at 245-46. A year later in *Carlson v. Green* the Court viewed a *Bivens*-type suit brought by the administratrix of a deceased federal prisoner as involving no "special factors counseling hesitation" because the petitioner did not enjoy "such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." 446 U.S. 14, 18-19 (1980).

51. See *Halperin v. Kissinger*, 606 F.2d 1192, 1195 (D.C. Cir. 1979), *aff'd in part and dismissed in part*, 452 U.S. 713 (1981). A former National Security Council staff member alleged that his fourth amendment rights were violated by a warrantless wiretap of his home. See *id.* at 1195.

its Framers in reaching a conclusion.⁵² Two contentions were made in support of the view that the President should not be treated differently from other federal executives: (1) there is no mention of presidential immunities in the Constitution; and (2) there is evidence that the Framers rejected the concept of presidential immunity at the Constitutional Convention.⁵³ The first point is directly supported by the absence of a provision emulating the Speech or Debate Clause for legislators.⁵⁴ In support of the second point, however, the court relied more heavily upon circumstantial evidence.⁵⁵ The court noted that when James Madison suggested presidential immunities be considered, his proposal went unheeded.⁵⁶ In 1800, Charles Pinckney explained that an immunity for the President similar to that for legislators was not discussed because "[n]o privilege of this kind was intended for your Executive"⁵⁷ Other colonial statesmen, however, expressed contrary views on the subject.⁵⁸

Nixon v. Fitzgerald,⁵⁹ represents the first time the United States Supreme Court has considered the question whether a "privilege of this kind" is available for the President.⁶⁰ Writing for the majority, Justice

52. See *id.* at 1211.

53. See *id.* at 1211.

54. See *id.* at 1211; see also *Nixon v. Sirica*, 487 F.2d 700, 711 (1973) ("This silence cannot be ascribed to oversight").

55. See *Halperin v. Kissinger*, 606 F.2d 1192, 1211 n.129 (D.C. Cir. 1979), *aff'd in part and dismissed in part*, 452 U.S. 713 (1981).

56. See *id.* at 1211 n.129.

57. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 385 (M. Farrand ed. 1966).

58. See W. MACLAY, JOURNAL OF W. MACLAY 167 (E. Maclay ed. 1890) (Senator Ellsworth and Vice President Adams defended proposition that "the President, personally, was not subject to any process whatever"), cited in *Nixon v. Fitzgerald*, ___ U.S. ___, ___, 102 S. Ct. 2690, 2702 n.31, 73 L. Ed. 2d 349, 364 n.31 (1982); X THE WORKS OF THOMAS JEFFERSON 404 (P. Ford ed. 1905) (quoting letter from President Jefferson at Burr trial) (Thomas Jefferson espoused idea that executive should be independent and not subject to "commands" of judiciary), cited in *Nixon v. Fitzgerald*, ___ U.S. ___, ___, 102 S. Ct. 2690, 2702 n.31, 73 L. Ed. 2d 349, 364 n.31 (1982).

59. ___ U.S. ___, 102 S. Ct. 2690, 73 L. Ed. 2d 349 (1982).

60. *Id.* at ___, 102 S. Ct. at 2697, 73 L. Ed. 2d at 358. Before the Court addressed the merits of the case, it dispensed with two challenges to its jurisdiction. First, the respondent claimed that the Court had no jurisdiction over the district court's rejection of Nixon's immunity claim because it was not a final order. The Court held that the order denying immunity fell within a defined group of interlocutory orders which may be immediately appealed to the court of appeals as established under the "collateral order" doctrine of *Cohen v. Beneficial Industries Loan Corp.*, 337 U.S. 541 (1949). The Court held that the order here met the "serious and unsettled question" criteria of *Cohen*. See *Nixon v. Fitzgerald*, ___ U.S. ___, ___, 102 S.Ct. 2690, 2698, 73 L. Ed. 2d 349, 358-59 (1982). Next, the Court held that the parties' agreement to liquidate damages did not moot the issue because both parties were left with a large financial stake under the agreement which depended on the Court's resolution of the case. See *id.* at ___, 102 S. Ct. at 2699, 73 L. Ed. 2d at 360.

Powell noted that absolute immunity for executive officials is based on "[c]onsiderations of 'public policy and convenience.'"⁶¹ Because of the broad range and sensitive nature of the President's responsibilities,⁶² his constant visibility,⁶³ and the judicial deference he has historically been accorded,⁶⁴ the Court concluded that civil damages suits would unduly distract the President from his official duties.⁶⁵ Relying on the Constitutional Convention debate on impeachment and the remarks of Justice Story and Thomas Jefferson, the Court opined that presidential immunity was intended.⁶⁶ Furthermore, the Court held that absolute immunity from civil damages suits is "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."⁶⁷ While recognizing that separation of powers would not consistently prevent a court's exercise of jurisdiction over the President,⁶⁸ the Court relied on earlier *Nixon* cases⁶⁹ for the proposition that the interest to be served must be weighed against the intrusion into the executive branch.⁷⁰ Because the President's actions can affect innumerable people, the Court feared the scrutiny inherent in civil damages suits would be overly intrusive.⁷¹ This same fear motivated the majority to extend the immunity to the "outer perimeter" of his official responsibility.⁷² In conclusion, the Court refuted the assertion that

61. *Nixon v. Fitzgerald*, ___ U.S. ___, ___, 102 S. Ct. 2690, 2699, 73 L. Ed. 2d 349, 360 (1982) (Court quoted *Spalding v. Vilas*, 161 U.S. 483, 498 (1896)).

62. *See id.* at ___, 102 S. Ct. at 2702, 73 L. Ed. 2d at 363-64 (1982). The Court described the President's duties as including "supervisory and policy responsibilities of the utmost discretion and sensitivity" and divided them into three classes: (1) enforcement of the federal law; (2) conducting foreign affairs; and (3) managing the executive branch. *See id.* at ___, 102 S. Ct. at 2702, 73 L. Ed. 2d at 363-64.

63. *See id.* at ___, 102 S. Ct. at 2703, 73 L. Ed. 2d at 365.

64. *See id.* at ___, 102 S. Ct. at 2703, 73 L. Ed. 2d at 366.

65. *See id.* at ___, 102 S. Ct. at 2703, 73 L. Ed. 2d at 365.

66. *See id.* at ___, 102 S. Ct. at 2701-03 & n.31, 73 L. Ed. 2d at 363-65 & n.31.

67. *Id.* at ___, 102 S. Ct. at 2701, 73 L. Ed. 2d at 363.

68. *See id.* at ___, 102 S. Ct. at 2704, 73 L. Ed. 2d at 366. The Court noted that President Nixon was found amenable to a subpoena duces tecum in *United States v. Nixon* and that an express order of President Truman's was enjoined in *Youngstown Sheet & Tube Co. v. Sawyer*. *See id.* at ___, 102 S. Ct. at 2704, 73 L. Ed. 2d at 366; *see also* *National Treasury Employees' Union v. Nixon*, 492 F.2d 587, 616 (D.C. Cir. 1974) (court has authority to mandamus President to implement statutorily required governmental employee pay increase).

69. *See Nixon v. Fitzgerald*, ___ U.S. ___, ___, 102 S. Ct. 2690, 2704, 73 L. Ed. 2d 349, 366 (1982). The Court relied on *Nixon v. Administrator Gen. Servs.*, 443 U.S. 425, 433 (1977), and *United States v. Nixon*, 418 U.S. 683, 703-13 (1974). *See id.* at ___, 102 S. Ct. at 2704, 73 L. Ed. 2d at 366.

70. *See id.* at ___, 102 S. Ct. at 2704, 73 L. Ed. 2d at 366.

71. *See id.* at ___, 102 S. Ct. at 2703, 73 L. Ed. 2d at 365.

72. *See id.* at ___, 102 S. Ct. at 2705, 73 L. Ed. 2d at 367. The Court noted that, frequently, earlier decisions restricted immunity to acts connected with particular functions of

the President is "above the law" and emphasized that absolute immunity from civil damages suits only precludes one private remedy in order to further compelling public interests.⁷³

Chief Justice Burger, in his concurring opinion, theorized that absolute immunity for the President must be found in the separation of powers doctrine, or it is non-existent.⁷⁴ Agreeing with the majority, the Chief Justice concluded that the far-reaching range of the President's decisions would lead to countless lawsuits with the inevitable result of extensively intruding upon the executive branch.⁷⁵ The concurrence also rebutted two points asserted by the dissent: (1) that the President is above the law,⁷⁶ and (2) that because the President has consistently been held amenable to judicial process, he is amenable to civil damages suits.⁷⁷ In addressing the first contention, Justice Burger reiterated the majority's point that only civil damage suits and acts within the President's official capacity are involved.⁷⁸ As to the second argument, he concluded that the dissent confused judicial process with civil suits, and therefore its reliance on *United States v. Nixon*⁷⁹ and *United States v. Burr*⁸⁰ was misplaced.⁸¹

In his dissent, Justice White asserted that the majority placed the President above the law⁸² and ignored holdings regarding judicial pro-

an office. *See id.* at ___, 102 S. Ct. at 2705, 73 L. Ed. 2d at 367. This approach was rejected because the Court considered it too difficult to align a particular result with one of the President's innumerable decisions; therefore, the Court adopted the rule from *Barr v. Matteo*, 360 U.S. 564, 575 (1959) that acts done within the "outer perimeter" of official capacity deserve immunity from civil damages suits and ruled that a departmental reorganization was within this limit. *See id.* at ___, 102 S. Ct. at 2705, 73 L. Ed. 2d at 367. The Court did not provide a definition for the "outer perimeter" in the instant case or in *Barr*.

73. *Id.* at ___, 102 S. Ct. at 2706, 73 L. Ed. 2d at 369. In a footnote, however, the Court seemed to qualify its holding: "[O]ur holding today need only be that the President is absolutely immune from civil damages liability for his official acts in the absence of explicit affirmative action by Congress." *Id.* at ___, 102 S. Ct. at 2701 n.27, 73 L. Ed. 2d at 363 n.27.

74. *See id.* at ___, 102 S. Ct. at 2707, 73 L. Ed. 2d at 370 (Burger, C.J., concurring).

75. *See id.* at ___, 102 S. Ct. at 2708, 73 L. Ed. 2d at 371 (Burger, C.J., concurring).

76. *See id.* at ___, 102 S. Ct. at 2709, 73 L. Ed. 2d at 372 (Burger, C.J., concurring). The dissenters believed that the majority clothed the President with sovereign immunity and thereby reverted to the old principle that "the King can do no wrong." *Id.* at ___, 102 S. Ct. at 2711, 73 L. Ed. 2d at 374 (White, J., dissenting).

77. *See id.* at ___, 102 S. Ct. at 2707, 73 L. Ed. 2d at 370 (Burger, C.J., concurring).

78. *See id.* at ___, 102 S. Ct. at 2707, 73 L. Ed. 2d at 370 (Burger, C.J., concurring).

79. 418 U.S. 683 (1974).

80. 25 F. Cas. 30 (C.C. Va. 1807) (No. 14,692d).

81. *See Nixon v. Fitzgerald*, ___, U.S. ___, ___, 102 S. Ct. 2690, 2707, 73 L. Ed. 2d 349, 370 (1982) (Burger, C.J., concurring). Burger stressed that the "judicial process" in these cases was a subpoena requiring production of evidence for a criminal prosecution. *Id.* at ___, 102 S. Ct. at 2707, 73 L. Ed. 2d at 370 (Burger, C.J., concurring).

82. *See id.* at ___, 102 S. Ct. at 2711, 73 L. Ed. 2d at 374 (White, J., dissenting). Justices Brennan, Marshall, and Blackmun joined in the dissent. *Id.* at ___, 102 S. Ct. at 2709, 73 L.

cess.⁸³ Since subjecting the President to judicial review and judicial process has not been considered intrusive,⁸⁴ the dissent analogized that subjecting the President to civil damages claims should be no more intrusive.⁸⁵ The dissent's primary arguments, however, were (1) that the traditional functional approach to immunity questions—which is defined as attaching absolute immunity to various functions of an office, not to the office itself—has been abandoned,⁸⁶ and (2) that the majority produced a policy decision wholly at odds with the Constitution, history, and the law.⁸⁷ After noting that the Constitution contains no provision for presidential immunity,⁸⁸ the dissent attacked President Nixon's colonial history evidence.⁸⁹ In so doing, however, the dissent did not proclaim that history mandates the President be subject to civil liability, but only that it does not demand he should be immune.⁹⁰ The majority decision was

Ed. 2d at 372 (White, J., dissenting). Justice Blackmun also wrote a dissent in which Justices Brennan and Marshall joined and concluded that in light of the parties' settlement agreement, certiorari should have been denied. *See id.* at —, 102 S.Ct. at 2726-27, 73 L. Ed. 2d at 394-95 (Blackmun, J., dissenting).

83. *See id.* at —, 102 S. Ct. at 2718, 73 L. Ed. 2d at 383-84 (White, J., dissenting).

84. *See id.* at —, 102 S. Ct. at 2718, 73 L. Ed. 2d at 383-84 (White, J., dissenting). The dissenters noted that the President has been subject to the injunctive powers of the courts and has been held amenable to subpoenas duces tecum in criminal proceedings. *See id.* at —, 102 S. Ct. at 2718, 73 L. Ed. 2d at 383-84 (White, J., dissenting).

85. *See id.* at —, 102 S. Ct. at 2718, 73 L. Ed. 2d at 384 (White, J., dissenting).

86. *See id.* at —, 102 S. Ct. at 2720, 73 L. Ed. 2d at 385 (White, J., dissenting).

87. *See id.* at —, 102 S. Ct. at 2712, 73 L. Ed. 2d at 376 (White, J., dissenting).

88. *See id.* at —, 102 S. Ct. at 2713, 73 L. Ed. 2d at 377 (White, J., dissenting).

89. *See id.* at —, 102 S. Ct. at 2713, 73 L. Ed. 2d at 377 (White, J., dissenting). Nixon relied on the following three items: (1) preratification remarks at the Constitutional Convention during the presidential impeachment debate and in *The Federalist*; (2) remarks made at the First Senate Meeting; and (3) Justice Story's *Commentaries*. The dissent refuted the majority's conclusion that impeachment was to be the only means of punishing the President and noted that the convention debate focused on potential wrongs against the state, not against individuals. *See id.* at —, 102 S. Ct. at 2713-14, 73 L. Ed. 2d at 377-78 (White, J., dissenting). Similarly, the dissent noted that Hamilton was also concerned with wrongs against the state in *The Federalist* and that opposing views of other statesmen nullified any support to be found in them. *See id.* at —, 102 S. Ct. at 2714-15, 73 L. Ed. 2d at 378-79 (White, J., dissenting). The dissent also pointed out that there were contrasting opinions expressed at the First Senate Meeting regarding the President's amenability. Finally, the dissent discounted the views of Justice Story by stressing that they came 46 years after the convention and by comparing them to the contrary views of convention delegate Senator Pinckney. *See id.* at —, 102 S. Ct. at 2715-16, 73 L. Ed. 2d at 380-81 (White, J., dissenting).

90. *See id.* at —, 102 S. Ct. at 2714 n.13, 73 L. Ed. 2d at 378 n.13 (White, J., dissenting). The dissenters concluded that "nothing in the debates suggests an expectation that the President would not be liable in civil suits for damages" *Id.* at —, 102 S. Ct. at 2714 n.13, 73 L. Ed. 2d at 378 n.13 (White, J., dissenting). According to them, the State Ratifying Convention reveals only that the President's accountability to judicial process "was no clearer then than it is now." *Id.* at —, 102 S. Ct. at 2715, 73 L. Ed. 2d at 380 (White, J.,

viewed as being at odds with the law not only because it ignored the functional approach⁹¹ but also because it caused congressional statutes to be circumvented.⁹² Finally, in assessing and attacking what they perceived to be the majority's three main points, the dissenters concluded the following: that the President's unique role does not justify a unique rule of liability;⁹³ that although he may be particularly visible and vulnerable to civil suits, summary judgment procedures would sufficiently protect the President;⁹⁴ and that even if it is assumed that the President will be distracted by law suits, legal accountability justifies this cost.⁹⁵

Not content to base its argument solely on the separation of powers, the majority also urged public policy⁹⁶ and historical arguments.⁹⁷ Indeed, it is these two premises which merited the most vigorous retorts from the dissent.⁹⁸ Justice Burger, on the other hand, essentially limited his opin-

dissenting). Further, the dissenters believed that nothing in history suggests that the President should be immune. *See id.* at ___, 102 S. Ct. at 2717, 73 L. Ed. 2d at 382 (White, J., dissenting).

91. *See id.* at ___, 102 S. Ct. at 2720, 73 L. Ed. 2d at 385 (White, J., dissenting).

92. *See id.* at ___, 102 S. Ct. at 2720-21, 73 L. Ed. 2d at 386-87 (White, J., dissenting). The dissent concluded that the two statutes under which Fitzgerald stated a cause of action were designed to provide Congress with access to information in the possession of the executive branch and that allowing the President to avoid these actions "assumes that presidential functions are to be valued over congressional functions." *Id.* at ___, 102 S. Ct. at 2721, 73 L. Ed. 2d at 387 (White, J., dissenting).

93. *See id.* at ___, 102 S. Ct. at 2725, 73 L. Ed. 2d at 392 (White, J., dissenting).

94. *See id.* at ___, 102 S. Ct. at 2725, 73 L. Ed. 2d at 392-93 (White, J., dissenting). The dissent also said a fear of subjecting the President to a multitude of civil suits was unwarranted since historically the President has not been the subject of innumerable suits, and even though a *Bivens*-type action has only been available since 1971, there have not been many actions filed under it. *See id.* at ___, 102 S. Ct. at 2725, 73 L. Ed. 2d at 393 (White, J., dissenting). *But see* Butz v. Economou, 438 U.S. 478, 526 (1978) (Rehnquist, J., dissenting). Justice Rehnquist pointed out that from 1961 to 1977 the number of cases brought under the civil rights statutes, which provide citizens with a cause of action against federal officials, increased from 296 to 13,113; furthermore, he feared a similar pattern would be repeated in respect to the President if the path were cleared. *See id.* at 526 (Rehnquist, J., dissenting).

95. *See* Nixon v. Fitzgerald, ___ U.S. ___, ___, 102 S. Ct. 2690, 2726, 73 L. Ed. 2d 349, 393 (1982) (White, J., dissenting).

96. *See id.* at ___, 102 S. Ct. at 2699-700, 73 L. Ed. 2d at 360-61. The majority emphasized that the public interest often requires a grant of immunity to public officers as this will insure that officials act without fear of retribution. The majority also determined that because of the President's unique visibility he would be especially distracted by the constant threat of law suits which would be a detriment to both the presidency and the nation. *Id.* at ___, 102 S. Ct. at 2699-700, 73 L. Ed. 2d at 360-61.

97. *See id.* at ___, 102 S. Ct. at 2701-03 & n.31, 73 L. Ed. 2d at 364-65 & n.31.

98. *See id.* at ___, 102 S. Ct. at 2712-17, 73 L. Ed. 2d at 378-82 (White, J., dissenting). The dissenters opined that the majority decision is "policy, not law" and "very poor policy." *Id.* at ___, 102 S. Ct. at 2712, 73 L. Ed. 2d at 376 (White, J., dissenting). The dissent also

ion to the separation of powers issue.⁹⁹ Thus, the concurring opinion avoided a confusing corollary¹⁰⁰ and the detracting weaknesses in the majority's argument, and thereby produced a sounder disposition of the issue. The weakest link in the majority's line of reasoning, which is avoided by the concurrence, is the historical evidence.¹⁰¹ A quote from Justice Story is the only example which the majority did not relegate to footnote status.¹⁰² While Justice Story expressly stated that the President "must be deemed, in civil cases at least, to possess an official inviolability,"¹⁰³ the text was written in 1833 in his commentaries rather than in a Supreme Court opinion.¹⁰⁴ It can, therefore, hardly be considered precedent as to the Framers' intent. The majority also relied on the impeachment debate at the Constitutional Convention and the remarks of Thomas Jefferson.¹⁰⁵ Because the dissent ably attacked these indicia and presented contrary opinions of other prominent colonial statesmen,¹⁰⁶ the only deduction which can be made from all of the historical evidence is that

devoted several paragraphs to attacking and countering the majority's historical offerings. *See id.* at ___, 102 S. Ct. at 2713-17, 73 L. Ed. 2d at 378-82 (White, J., dissenting).

99. *See id.* at ___, 102 S. Ct. at 2706, 73 L. Ed. 2d at 369 (Burger, C.J., concurring).

100. *See id.* at ___, 102 S. Ct. at 2701 n.27, 73 L. Ed. 2d at 363 n.27. The confusing suggestion the majority added is in a footnote wherein it is intimated that Congress could alter the holding. *See id.* at ___, 102 S. Ct. at 2701 n.27, 73 L. Ed. 2d at 363 n.27. Justice Burger, also in a footnote, decreed that the opinion should be read as precluding legislative alteration. *See id.* at ___, 102 S. Ct. at 2709 n.7, 73 L. Ed. 2d at 372 n.7 (Burger, C.J., concurring).

101. *See id.* at ___, 102 S. Ct. at 2702-03 n.31, 73 L. Ed. 2d at 364-65 n.31.

102. *See id.* at ___, 102 S. Ct. at 2701, 73 L. Ed. 2d at 363.

103. *Id.* at ___, 102 S. Ct. at 2701-02, 73 L. Ed. 2d at 363 (quoting J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563, at 418-19 (1833)).

104. *See id.* at ___, 102 S. Ct. at 2715, 73 L. Ed. 2d at 380 (White, J., dissenting). The dissent emphasized the date of Justice Story's comments and then countered with the opposite views of Senator Pinckney, who argued it was a deliberate choice of the delegates at the Constitutional Convention not to extend civil suit immunity to the President. *See id.* at ___, 102 S. Ct. at 2716, 73 L. Ed. 2d at 381 (White, J., dissenting).

105. *See id.* at ___, 102 S. Ct. at 2702 n.31, 73 L. Ed. 2d at 364 n.31. Relying on Jefferson's words that the executive should not be subject to the commands of the judiciary in any form, the majority noted that several Constitutional Convention delegates were fearful that even impeachment would too greatly impair the function of the President's office. *See id.* at ___, 102 S. Ct. at 2702 n.31, 73 L. Ed. 2d at 364 n.31.

106. *See id.* at ___, 102 S. Ct. at 2713-15, 73 L. Ed. 2d at 377-79 (White, J., dissenting). The dissent contended that the immunity debate is irrelevant because it focused on presidential wrongs against the state, not individuals. *See id.* at ___, 102 S. Ct. at 2713-14, 73 L. Ed. 2d at 378 (White, J., dissenting). It also presented the views of Governor Johnson of North Carolina, James Wilson, and Senator Maclay. *See id.* at ___, 102 S. Ct. at 2714-15, 73 L. Ed. 2d at 379-80 (White, J., dissenting). Additionally, the dissenters demonstrate their refusal to accept the opinion of any one of these early statesmen: "There is no more reason to respect the views of Hamilton than those of Wilson." *Id.* at ___, 102 S. Ct. at 2715, 73 L. Ed. 2d at 379 (White, J., dissenting).

there were many diversified opinions, none of which were given express support in the Constitution.¹⁰⁷

The dissent was quick to point out that because there is an express provision in the Constitution for legislators one would have been provided for the President if one had been intended.¹⁰⁸ As the majority rebutted,¹⁰⁹ however, there is not an express provision for judges, prosecutors, state legislators, or legislative aides, yet all of these officials have been extended absolute immunity.¹¹⁰ Turning to the separation of powers, the dissent relied on the "presidential privilege" cases¹¹¹ as precluding any

107. Compare W. MACLAY, JOURNAL OF W. MACLAY 167 (E. Maclay ed. 1890) (Senator Ellsworth and Vice President Adams defended proposition that "the President, personally, was not subject to any process whatever . . ."), cited in *Nixon v. Fitzgerald*, ___ U.S. ___, 102 S. Ct. 2690, 2702 n.31, 73 L. Ed. 2d 349, 364 n.31 (1982) with 2 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 480 (James Wilson proclaimed at Pennsylvania ratifying convention that President amenable to civil process), cited in *Nixon v. Fitzgerald*, ___ U.S. ___, 102 S. Ct. 2690, 2715, 73 L. Ed. 2d 349, 379 (1982) (White, J., dissenting). It is significant that while it was suggested that presidential immunity should be discussed, the subject was not debated at the convention itself. See *Halperin v. Kissinger*, 606 F.2d 1192, 1211 n.129 *aff'd in part and dismissed in part*, 452 U.S. 713 (1981); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 503 (M. Farrand ed. 1911). In 1800, however, Senator Pinckney, who had been at the convention, explained that there was no discussion because no privilege was intended. See 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 385 (M. Farrand ed. 1911). Despite Pinckney's words, the Supreme Court has long recognized that the President should be accorded strict judicial restraint. See *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610 (1838) ("The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power."); see also *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866) (Court had no jurisdiction to enjoin President in official acts); Schwartz, *Bad Presidents Make Hard Law: Richard M. Nixon In The Supreme Court*, 31 RUTGERS L. REV. 22, 26 (1978) (*Mississippi v. Johnson* never overruled and is therefore formal bar to suits with President as defendant).

108. See *Nixon v. Fitzgerald*, ___ U.S. ___, 102 S. Ct. 2690, 2713, 73 L. Ed. 2d 349, 377 (1982) (White, J., dissenting).

109. See *id.* at ___, 102 S. Ct. at 2702 n.31, 73 L. Ed. 2d at 364 n.31.

110. See *Imbler v. Pachtman*, 424 U.S. 409, 422-23 (1976) (prosecutors); *Gravel v. United States*, 408 U.S. 606, 616 (1972) (legislative aides); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (state legislators); *Kilbourn v. Thompson*, 103 U.S. 168, 200-05 (1880) (federal legislators); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351-52 (1871) (judges).

111. *United States v. Nixon*, 418 U.S. 683, 703-13 (1974); *United States v. Burr*, 25 F. Cas. 30, 34 (C.C. Va. 1807) (No. 14,692d). The difference between a privilege and an immunity should be noted. Prosser states that a privilege avoids tort liability under "particular circumstances" while an immunity avoids liability "under all circumstances within the immunity itself; it is conferred, not because of the particular facts, but because of the status or position of the favored defendant; and it does not deny the tort, but the resulting liability." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 970 (4th ed. 1971). Former Supreme Court Justice Abe Fortas summarized executive privilege as "the principle that, in limited situations, the courts will permit the President or a principal executive officer to decline to comply with subpoenas or congressional demands" Fortas, *The Constitution and the*

assertion that civil suit amenability violates that principle.¹¹² This reliance, however, is misplaced. The holdings of *United States v. Burr* and *United States v. Nixon* were that a President was subject to subpoenas duces tecum in specific criminal matters.¹¹³ Amenability to subpoenas, however, does not presuppose amenability to civil suits.¹¹⁴ *United States v. Nixon*¹¹⁵ did expressly state that separation of powers was not violated,¹¹⁶ but the holding of that case has been considered extremely narrow.¹¹⁷ Thus, the dissent's conclusion, that since subjecting a President to a subpoena duces tecum did not violate the separation of powers then neither does subjecting him to civil damages liability, is fallacious.¹¹⁸

While the holding of *United States v. Nixon*¹¹⁹ is not dispositive of *Nixon v. Fitzgerald*,¹²⁰ it does contain the Supreme Court's most recent approach to separation of powers questions. This approach involves balancing the competing claims of the coordinate branches of the government to determine whether the constitutional functions of one branch have been invaded by acts of another branch.¹²¹ In *United States v. Nixon* the Court applied this balancing test by first recognizing that the

Presidency, 49 WASH. L. REV. 987, 998 (1974). Presidential privilege and immunity are similar in that neither is expressly supported by the Constitution; instead, both are said to arise from enumerated powers and the status of the office. Compare *Nixon v. Fitzgerald*, ___ U.S. ___, ___, 102 S. Ct. 2690, 2701, 73 L. Ed. 2d 349, 363 (1982) (immunity is a "functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers . . .") with *United States v. Nixon*, 418 U.S. 683, 704 (1974) (privilege flows from enumerated powers and need to protect the confidentiality of President's communications).

112. See *Nixon v. Fitzgerald*, ___ U.S. ___, ___, 102 S. Ct. 2690, 2717-18, 73 L. Ed. 2d 349, 383-84 (1982) (White, J., dissenting).

113. See *United States v. Nixon*, 418 U.S. 683, 710 (1974); *United States v. Burr*, 25 F. Cas. 30, 34 (C.C. Va. 1807) (No. 14,692d).

114. See Note, *Presidential Immunity from Constitutional Damage Liability*, 60 B.U.L. REV. 879, 902 (1980).

115. 418 U.S. 683 (1974).

116. See *id.* at 706-07.

117. See, e.g., Karst & Horowitz, *Presidential Prerogative And Judicial Review*, 22 U.C.L.A. L. REV. 47, 66 (1974) (holding narrow and unlikely to be repeated as circumstances unique); Schwartz, *Bad Presidents Make Hard Law: Richard M. Nixon In The Supreme Court*, 31 RUTGERS L. REV. 22, 23 (1978) (holding will rarely be applied again without comparable facts); Van Alstyne, *A Political And Constitutional Review Of United States v. Nixon*, 22 U.C.L.A. L. REV. 116, 117 (1974) (opinion "exceptionally restrained" and holding narrow).

118. Cf. *United States v. Nixon*, 418 U.S. 683, 713 (1974) (holding limited to President's amenability to subpoena duces tecum in "pending criminal trial").

119. 418 U.S. 683 (1974).

120. ___ U.S. ___, 102 S. Ct. 2690, 73 L. Ed. 2d 349 (1982).

121. See *United States v. Nixon*, 418 U.S. 683, 711-12 (1974). This balancing approach was also used in *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977).

judiciary and the executive were asserting equal yet competing claims: the judiciary's need for evidence to insure justice in a pending criminal trial and the President's interest in confidentiality.¹²² The Court then determined to what degree the claim of one branch would impede the function of the other.¹²³ Because President Nixon asserted only a general need for confidentiality and the judiciary demonstrated a "specific need for evidence in a pending criminal trial," it was concluded that the President's claim would intrude too deeply into the judiciary's function.¹²⁴ In arriving at this conclusion, the Court deemed it significant that intrusion into the executive branch would be minimal since the President and his advisors would not "be moved to temper the candor of their remarks by the infrequent occasions of disclosure"¹²⁵

When the foregoing analysis is applied to the case at hand, a separation of powers problem emerges. The competing claims are a President's need to insure uninhibited decision making and to be free from distracting law suits¹²⁶ versus the judiciary's responsibility for vindicating alleged violations of individuals' rights.¹²⁷ In this case the judiciary's claim is as generalized as the President's because more than one "pending" trial is in-

122. See Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 669 (1978).

123. See *United States v. Nixon*, 418 U.S. 683, 713 (1974); see also Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 668 (1978).

124. See *United States v. Nixon*, 418 U.S. 683, 713 (1974).

125. *Id.* at 712.

126. See *Barr v. Matteo*, 360 U.S. 564, 571 (1959). In discussing the disadvantages in subjecting public officials to civil damages liability, the Court noted the following:

It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

Id. at 571; see also *United States v. Nixon*, 418 U.S. 683, 708 (1974) (in public interest for President to feel free to express candid opinions in decision-making process); *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974) (recognized that immunity deters fear that amenability to lawsuits will cause officials to lack "decisiveness and the judgment required by the public good"); *Halperin v. Kissinger*, 606 F.2d 1192, 1213 n.144 (D.C. Cir. 1979) (immunity given to legislators to spare them "cost and inconvenience and distractions" of trials), *aff'd in part and dismissed in part*, 452 U.S. 713 (1981); *Yaselli v. Goff*, 12 F.2d 396, 404 (2d Cir. 1926) (public interest dictates that persons occupying "important positions . . . should speak and act freely and fearlessly in the discharge of their important official functions"), *aff'd per curiam*, 275 U.S. 503 (1927).

127. See *Davis v. Passman*, 442 U.S. 228, 241 (1979) (judiciary is primary means by which rights enforced); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971) (traditional rule that courts provide remedies when constitutional rights invaded).

volved.¹²⁸ Whereas in *United States v. Nixon* the court's ability to adjudicate the specific trial at issue would have been seriously impaired by a claim of presidential privilege,¹²⁹ here the judiciary's function will not be overwhelmingly impeded by according the President absolute immunity. On the contrary, courts will still be able to provide citizens with remedies: first, the President rarely acts alone and, therefore, other defendants could be joined;¹³⁰ second, statutory remedies may be available as they were for Fitzgerald.¹³¹ The executive's function, however, will be seriously impeded without immunity. Because of the countless and far-reaching decisions a President makes daily, countless people could consider themselves aggrieved and bring suit. Consequently, the intricacies of the executive decision making would be scrutinized countless times.¹³² Unlike the case in *United States v. Nixon*, the intrusion would be frequent and the tendency to "temper the candor" of remarks would be increased manifold.¹³³ In *Nixon v. Fitzgerald* the results of the balancing test affirmatively demonstrate that a separation of powers violation will exist unless the President is accorded absolute immunity from civil damages suits.

The dissenters declared that separation of powers does not warrant discarding the functional approach which determines the extent of immunity by confining it to certain functions of an office.¹³⁴ This approach, however, has not been abandoned. Viewing the functional approach as inadequate for the broad variety of the President's discretionary responsibili-

128. Compare *United States v. Nixon*, 418 U.S. 683, 713 (1974) (evidence needed for one pending criminal trial) with *Nixon v. Fitzgerald*, ___ U.S. ___, ___, 102 S. Ct. 2690, 2701, 73 L. Ed. 2d 349, 362 (1982) (decided whether President should be subject to all civil damages suits brought against him).

129. See *United States v. Nixon*, 418 U.S. 683, 713 (1974).

130. See, e.g., *Nixon v. Fitzgerald*, ___ U.S. ___, ___, 102 S. Ct. 2690, 2696, 73 L. Ed. 2d 349, 357 (1982) (Fitzgerald originally named eight officials as defendants); *Halperin v. Kissinger*, 606 F.2d 1192, 1195 (D.C. Cir. 1979) (Halperin sued ten federal officials including President Nixon), *aff'd in part and dismissed in part*, 452 U.S. 713 (1981); *Clark v. United States*, 481 F. Supp. 1086, 1096-97 (S.D.N.Y. 1979) (Clark sued ten federal officials including President), *cross appeal stayed*, 624 F.2d 3 (1980).

131. See *Nixon v. Fitzgerald*, ___ U.S. ___, ___, 102 S. Ct. 2690, 2696 n.15, 73 L. Ed. 2d 349, 356 n.15 (1982). The position Fitzgerald held in the Air Force was in the excepted service; therefore, he was not entitled to the protection of civil service rules and regulations. He was, however, accorded statutory protections under the Veterans Preference Act. See *id.* at ___, 102 S. Ct. at 2696 n.15, 73 L. Ed. 2d at 356 n.15.

132. See *Halperin v. Kissinger*, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring), *aff'd in part and dismissed in part*, 452 U.S. 713 (1981).

133. *United States v. Nixon*, 418 U.S. 683, 712 (1974).

134. See *Nixon v. Fitzgerald*, ___ U.S. ___, ___, 102 S. Ct. 2690, 2720, 2725, 73 L. Ed. 2d 349, 386, 392 (1982) (White, J., dissenting).

ties,¹³⁵ the majority simply applied the same scope of immunity used in other absolute immunity cases.¹³⁶ The dissenters also concluded that applying qualified immunity to the President would prevent intensive intrusion into the office and thereby satisfy the dictates of separation of powers.¹³⁷ They based this conclusion on their belief that summary judgment procedures would protect the President from defending frivolous suits.¹³⁸ Because qualified immunity involves a subjective and objective standard,¹³⁹ however, summary judgment procedures would hinder, rather than protect, the President. The subjective standard will obviously require delving into the President's state of mind to ascertain intent—an exercise which generally precludes a summary judgment.¹⁴⁰ The objective standard involves determining whether the President knew or should have known he was violating a constitutional right.¹⁴¹ Making this deter-

135. See *id.* at ___, 102 S. Ct. at 2705, 73 L. Ed. 2d at 367. One of the major qualified immunity cases even recognized that an office with broad discretion and complex responsibilities may be granted far-ranging immunity. See *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974) (scope of immunity will vary depending on discretion and functions of office). Who has greater responsibility than the President? See Fortas, *The Constitution And The Presidency*, 49 WASH. L. REV. 987, 987 (1974) ("The President's finger can put vast events in motion—not just the firing of the nuclear bomb").

136. See, e.g., *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) (judges immune even when act is "in excess of [their] authority" as long as not total absence of jurisdiction); *Barr v. Matteo*, 360 U.S. 564, 575 (1959) (executive officials have absolute immunity when acting within "the outer perimeter" of authority); *Spalding v. Vilas*, 161 U.S. 483, 498 (1896) (immunity extends to acts of executive "having more or less connection with the general matters committed by law to his control").

137. See *Nixon v. Fitzgerald*, ___ U.S. ___, ___, 102 S. Ct. 2690, 2719-20, 73 L. Ed. 2d 349, 385-86 (1982) (White, J., dissenting).

138. See *id.* at ___, 102 S. Ct. at 2725, 73 L. Ed. 2d at 393 (White, J., dissenting); see also *Butz v. Economou*, 438 U.S. 478, 508 (1978).

139. See *Wood v. Strickland*, 420 U.S. 308, 318 (1975); Note, *Presidential Immunity from Constitutional Damages Liability*, 60 B.U.L. REV. 879, 887 (1980).

140. See, e.g., *Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962) (when intent and motive play leading role, summary judgment should rarely be used); *Croley v. Matson Navigation Co.*, 434 F.2d 73, 77 (5th Cir. 1970) (when dispositive issue requires determination of state of mind, courts should be cautious in granting summary judgment); *Alles Corp. v. Senco Prods., Inc.*, 329 F.2d 567, 572 (6th Cir. 1964) (questions of intent generally preclude summary judgment). "Inasmuch as a determination of someone's state of mind usually entails the drawing of factual inferences as to which reasonable men might differ . . ." summary judgment is often inappropriate. 10A C. WRIGHT, A. MILLER & M. KANE, *FEDERAL PRACTICE AND PROCEDURE* § 2730, at 238 (1983).

141. See, e.g., *Procunier v. Navarette*, 434 U.S. 555, 562 (1978) (prison administrators not entitled to absolute immunity if knew or should have known prisoner's constitutional rights infringed); *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975) (question for jury whether hospital superintendant knew or should have known he violated mental patient's rights); *Wood v. Strickland*, 420 U.S. 308, 322 (1975) (school board member not immune if knew or should have known student's constitutional rights violated).

mination would require reconstructing the entire factual surroundings in which the action was taken.¹⁴² Again, such factual determinations would inevitably require a trial on the merits.¹⁴³ In any event, it is not difficult for an attorney to "create a material issue of fact" which would require a full trial on the merits.¹⁴⁴

Summary judgment proceedings would not protect the presidential office from the scrutiny and distractions which offend the constitutional principle of separation of powers. Only absolute immunity will provide that protection. The Supreme Court has determined that absolute immunity would be appropriate for an office which maintains a certain "independent status" in our government.¹⁴⁵ What office in the United States, and indeed in the world, is as powerful and prestigious as the presidency? That absolute immunity has placed the President above the law is a misconception for he still may be subject to impeachment,¹⁴⁶ and to mandamus, injunctions, and subpoena duces tecum in criminal trials,¹⁴⁷ as well

142. See *Scheuer v. Rhodes*, 416 U.S. 232, 239 (1974) (official's liability depends on all circumstances as revealed by evidence). In order for a determination to be made regarding what the President knew or should have known, details of the executive office would need to be exposed. Cf. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 32, at 157 (4th ed. 1971):

Knowledge . . . rests upon [the] perception of the actor's surroundings, memory of what has gone before, and a power to correlate the two with previous experience. So far as perception is concerned, . . . the actor must give to his surroundings the attention which a standard reasonable man would consider necessary under the circumstances

Id. at 157.

143. See, e.g., *Poller v. CBS, Inc.*, 368 U.S. 464, 467 (1962) (summary judgment should not be granted unless truth clear); *S. J. Groves & Sons Co. v. Ohio Turnpike Comm'n*, 315 F.2d 235, 237-38 (6th Cir.) (when parties may in good faith disagree about inferences to be drawn from facts, summary judgment not proper), *cert. denied*, 375 U.S. 824 (1963); *Jack Winter Inc. v. Koratron Co.*, 327 F. Supp. 206, 210 (N.D. Ca. 1971) ("One often gains valuable insight from the total facts which cannot be acquired from a microscopic approach which obtains on a summary judgment . . .").

144. *Halperin v. Kissinger*, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring), *aff'd in part and dismissed in part*, 452 U.S. 713 (1981). The concurring justice noted that "a sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually" require a full trial on the merits. *Id.* at 1214 (Gesell, J., concurring).

145. *Carlson v. Green*, 446 U.S. 14, 16-19 (1980); see also *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974) (Court stated more immunity appropriate with offices with greater responsibilities).

146. U.S. CONST. art. II, § 4.

147. See, e.g., *United States v. Nixon*, 418 U.S. 683, 713 (1974) (President subject to subpoena duces tecum in criminal trial); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584, 589 (1952) (Secretary of Commerce enjoined from executing direct presidential order); *National Treasury Employees' Union v. Nixon*, 492 F.2d 587, 616 (D.C. Cir. 1974) (President subject to mandamus to implement statutorily required governmental employee pay increase).

as being amenable to civil suits when acting beyond the outer perimeter of his official capacity. Moreover, the President, more than any other public official, is subject to the criticisms of a demanding public analyzing his every move. It may be true that over the decades a very small number of individuals with meritorious claims will be precluded from recovering from one possible defendant;¹⁴⁸ yet that cost is required by the principle of separation of powers and is imperative to maintain the effective operation of our government.

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148. See *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). In that case, Judge Learned Hand explained that:

The justification for [denying recovery] is that it is impossible to know whether the claim is well-founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.

Id. at 581.