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Degree of Immunity Applicable to Senior Aides of the President of the United States in Civil Actions Arising Under the Constitution: *Harlow v. Fitzgerald*

In *Harlow v. Fitzgerald*[1] the United States Supreme Court held that senior aides to the President of the United States are not entitled to absolute immunity in a civil damages action for alleged constitutional violations.[2] With this decision the Court purports to continue the functional approach to immunity law that it identified in *Scheuer v. Rhodes*[3] and amplified in *Butz v. Economou*,[4] although in fact the Court did not examine the functional factors identified in those cases.

I. The *Harlow* Case

In November of 1968 A. Ernest Fitzgerald, a management analyst with the Department of the Air Force, testified before a congressional subcommittee. To the chagrin of his supervisors, his testimony revealed billion dollar overruns in the purchase and development of the C-5A transport plane.[5] Fitzgerald was

1. 102 S. Ct. 2727 (1982). The Justices vacated the judgment of the court of appeals and remanded the case to the district court for further action consistent with the Court's opinion.

2. In Imbler v. Pachtman, 424 U.S. 409 (1978), the difference between absolute and qualified immunity was described in the following manner: "[A]n absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivation of his actions as established by evidence at trial." *Id.* at 419 n.13 (citations omitted).

3. 416 U.S. 232 (1974). In a damages action under 42 U.S.C. § 1983 against the Governor of Ohio and his aides, the Court held that officers of the executive branch of a state government have only qualified immunity from suits involving their official acts. The immunity varies in degree with the scope of discretion, the responsibilities of the particular office, and the circumstances existing at the time the challenged action was taken. 416 U.S. at 238-49.

4. 438 U.S. 478 (1978). In a damages action against the Secretary of Agriculture, the Court extended *Scheuer* to include federal executive officials. The Court concluded that qualified immunity was the norm for both state and federal executive officers.

5. Nixon v. Fitzgerald, 102 S. Ct. 2690, 2693-94 (1982). Unless otherwise noted, all factual references are from this companion case of *Harlow*. *Nixon v. Fitzgerald* concerned the same alleged conspiracy that comprises the cause of action in *Harlow*. The aim of the conspiracy was to deprive the respondent Fitzgerald of his position in the Defense Department.

subsequently dismissed from his position in the context of a department-wide reduction in force.

Fitzgerald complained to the Civil Service Commission alleging his dismissal reflected unlawful retaliation for his testimony before Congress. In public hearings before the Commission,[6] Air Force Secretary Robert Seamans testified he had received "some advice" from the White House prior to Fitzgerald's dismissal, but invoking executive privilege, Seamans refused to reveal what that advice had been. The Commission recommended that Fitzgerald be reappointed to his old position or one comparable to it. The Commission refused, however, to find Fitzgerald's dismissal had been retaliatory.[7] Subsequently, Fitzgerald filed a suit for damages in the United States District Court for the District of Columbia, alleging a continuing conspiracy to violate his constitutional and statutory rights.[8]

In an amended complaint, Fitzgerald named Alexander P. Butterfield,[9] Bryce N. Harlow,[10] and former President Richard M. Nixon[11] as defendants. The defendants moved for summary

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6. A closed hearing was originally convened on May 4, 1971, but Fitzgerald obtained a court order in Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972), to require public hearings. Public hearings were also conducted by the Subcommittee on Economy in Government of the Joint Economic Committee of Congress. Both hearings were widely reported by the national press.

7. Nixon v. Fitzgerald, 102 S. Ct. at 2696.

8. Fitzgerald v. Seamans, 384 F. Supp. 688 (D.D.C. 1974). The complaint raised the same claims presented to the Civil Service Commission. Fitzgerald alleged a conspiracy to deprive him of his job, deny him reemployment, and besmirch his reputation. Fitzgerald asserted causes of action arising from inferred statutory causes of action under 5 U.S.C. § 7211 (Supp. V 1981) and 18 U.S.C. § 1505 (1976), and violations of his first amendment rights. Section 7211 prohibits any interference with the right of federal employees to furnish information to either house of Congress or to a committee or Member thereof. Section 1505 provides criminal sanctions for obstructing congressional testimony.

9. Fitzgerald alleged that Butterfield authorized a White House memo that questioned Fitzgerald's loyalty and proposed that he be allowed to "bleed awhile" before the Administration reassigned him to another position. Nixon v. Fitzgerald, 102 S. Ct. at 2694-95.

10. Fitzgerald claimed Harlow, as the senior presidential aide in charge of congressional relations and later as counsellor to the President, discussed Fitzgerald's termination with Air Force Secretary Seamans and was thus involved in the conspiracy. *Harlow*, 102 S. Ct. at 2730 n.2. Fitzgerald also points to tapes in which the President had voiced a "tentative recollection that Harlow was 'all for canning' Fitzgerald." *Id.* at 2731.

11. Fitzgerald's complaint asserted that President Nixon participated in the conspiracy and cited a statement made by the President that he was "totally aware of" and "approved" the respondent's dismissal. The statement was later retracted. The White House explained that the President had confused the Fitzgerald dismissal with that of another official. Nixon v. Fitzgerald, 102 S. Ct. at 2695.

judgment. The district court denied the motion, upholding Fitzgerald's constitutional and statutory causes of action and denying absolute immunity both to Nixon, as a former President, and to petitioners, as his senior aides.[12]

The petitioners appealed the denial of absolute immunity independently of Nixon.[13] The United States Court of Appeals for the District of Columbia Circuit dismissed the appeal without opinion.[14] The Supreme Court granted certiorari[15] to assess the proper level of immunity to be accorded senior aides to the President of the United States.

The majority held that senior presidential aides are generally entitled to only qualified immunity. Writing for the Court, Justice Powell identified those government officials entitled to absolute immunity. They may include legislators,[16] judges,[17] and prosecutors[18] in their respective functions; other executive officers who perform adjudicative functions;[19] and the President of the United States.[20] Generally, however, qualified immunity from claims involving constitutional violations is the norm for executive officials.[21] The Court noted that denial of absolute immunity from civil suit would, at times, subject executive officials to insubstantial suits, but admonished courts to minimize this consequence by being alert to "possibilities of artful pleading" and through "firm application of the Federal Rules of Civil Procedure."[22]

The Court concluded its opinion by streamlining the quali-

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12. Petitioner's Brief for Certiorari at 1a-2a, *Harlow*, 102 S. Ct. 2727 (1982).

13. Nixon made a collateral appeal of the immunity portion of the district court's decision to the Court of Appeals for the District of Columbia Circuit. The appeal was summarily dismissed. Nixon v. Fitzgerald, 102 S. Ct. at 2698. The Supreme Court reversed and remanded the case to the district court, holding that a President of the United States has absolute immunity from civil suit for his official acts. *Id.* at 2701.

14. *Harlow*, 102 S. Ct. at 2732.

15. 452 U.S. 959 (1981).

16. *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975).

17. *See* Stump v. Sparkman, 435 U.S. 349 (1978).

18. *See* Imbler v. Pachtman, 424 U.S. 409 (1976).

19. *See Butz*, 438 U.S. at 513-17.

20. *See* Nixon v. Fitzgerald, 102 S. Ct. at 2701.

21. *Harlow*, 102 S. Ct. at 2733. The Court cited Scheuer v. Rhodes, 416 U.S. 232 (1974), and Butz v. Economou, 438 U.S. 478 (1978). In Spalding v. Vilas, 161 U.S. 483 (1896), and more recently in Barr v. Matteo, 360 U.S. 564 (1959), both defamation actions against federal executive officials, the Court declared the officials absolutely immune. *Butz* and *Scheuer*, in declaring a general rule of qualified immunity for federal officials, limited this absolute immunity to cases involving common law torts. *E.g.*, *Butz*, 438 U.S. at 495-96.

22. *Harlow*, 102 S. Ct. at 2733 (quoting *Butz*, 438 U.S. at 507-08).

fied immunity standard to accord with the admonition in *Butz* that frivolous claims be defeated prior to trial.[23] The qualified immunity standard as set out in *Wood v. Strickland*[24] denies immunity if an official "knew or reasonably should have known" that his official actions infringed upon constitutionally protected rights or if the official's actions were taken "with malicious intention" to cause a deprivation of or injury to those constitutional rights.[25] The *Harlow* Court deleted the subjective prong of the test that dealt with the malicious intentions of an official because many courts had felt constrained to submit that issue to a jury.[26]

The dissent, authored by Chief Justice Burger, argued that the Court had ignored the rationale in *Gravel v. United States*,[27] which granted aides of members of Congress absolute immunity for acts that would have been privileged if they had been performed by the congressman himself. By declining to recognize absolute immunity for those aides characterized as the "arms and fingers" of the President, the Chief Justice asserted, the majority had exposed the inner workings of the White House to constant judicial scrutiny. This, the dissent concluded, not only frustrates the efficient workings of the White House, but imposes strictures upon the executive branch beyond those contemplated by the checks and balances system.[28]

II. ANALYSIS

The Court's decision to deny absolute immunity to senior aides of the President of the United States seriously undermines the ability of the President to discharge his constitutionally mandated duties and departs from the functional approach to the doctrine of governmental immunity that characterized the Court's decisions in *Scheuer v. Rhodes*,[29] *Butz v. Economou*,[30]

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23. *Harlow*, 102 S. Ct. at 2733.
24. 420 U.S. 308 (1975).
25. *Id.* at 322.
26. *See infra* note 70.
27. 408 U.S. 606 (1972).
28. Chief Justice Burger wrote: "[E]xposure to civil liability for official acts will result in constant judicial questioning, through judicial proceedings and pretrial discovery, into the inner workings of the Presidential Office beyond that necessary to maintain the traditional checks and balances of our constitutional structure." 102 S. Ct. at 2743 (Burger, C.J., dissenting) (footnote omitted).
29. 416 U.S. 232 (1974).
30. 438 U.S. 478 (1978).

Gravel v. United States,[31] and *Nixon v. Fitzgerald*.[32] However, the decision to jettison the subjective prong of the test for qualified immunity is sound in light of the Court's goal in qualified immunity suits to identify and dismiss insubstantial actions at an early stage of litigation.[33]

A. Absolute Immunity

In formulating a functional approach to immunity, the Court has been outlined three ways in which a government official may justify the protection of absolute immunity. First, an official may be granted absolute immunity as incident to certain positions.[34] Generally absolute immunity is awarded to the holder of a particular office because the duties of that office both manifest a need for wide-ranging discretion and are likely to provoke retaliatory suits. Absolute immunity is incident to the offices of legislators, judges, prosecutors, and other officials who perform adjudicative functions. The President of the United States is absolutely immune for his official acts by virtue of his unique office. Second, a government aide may obtain absolute immunity derivatively from a superior. Aides to members of Congress, for example, are derivatively immune from suits involving their legislative activities. Third, an official may be accorded absolute immunity when he performs a sensitive or "special" function. This provides immunity for those governmental officers or aides who can justify the need for absolute immunity as necessary to protect the "unhesitating performance of functions vital to the national interest."[35] Examples of those officials who might qualify for special functions immunity include those entrusted with discretionary authority in the areas of national

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31. 408 U.S. 606 (1972).

32. 102 S. Ct. 2690 (1982).

33. In *Butz* the Court outlined the proper treatment of frivolous lawsuits:

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief . . . , it should not survive a motion to dismiss. Moreover, the Court recognized in [*Scheuer*] that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. . . . In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.

102 S. Ct. at 2733 (quoting *Butz*, 438 U.S. at 507-08) (citations omitted).

34. *See Butz*, 438 U.S. at 508-17.

35. *Harlow*, 102 S. Ct. at 2735 (footnote omitted).

security or foreign policy.[36]

Underlying the Court's functional approach to the doctrine of governmental immunity is its struggle to equalize the tension between two competing values. Ideally society should allow for redress where there has been damage. However, the government, being burdened with the responsibility to make decisions, must be able to make its decisions vigorously and efficiently, free from the threat of vindictive litigation. In balancing these values, courts determine that certain government functions are so sensitive that threat of civil suit would compromise the ability of government to govern. Therefore courts grant absolute immunity from civil suit. In all other cases qualified immunity from civil damages, predicated upon a showing of the reasonableness of an official's conduct, is applied.[37] The scope of this qualified immunity is dependent upon factors that include the degree of responsibility and the scope of discretion implicit in the performance of the official's duties.[38]

1. Absolute immunity as incident to the office of senior presidential aide

In *Harlow* the petitioners asserted that senior presidential aides should be entitled to absolute immunity as incident to their office. In answering the assertion, the Court relied on *Butz v. Economou.* There, in a civil damage action for alleged constitutional violations, the Court found that the Secretary of Agriculture, as a cabinet-level executive, was entitled to only qualified immunity.[39] The *Harlow* Court reasoned that, since absolute immunity was not incident to the position of a cabinet official who is directly accountable to the President, it would be "untenable to hold absolute immunity an incident of the office of every Presidential subordinate based in the White House."[40]

It is true that in *Butz,* facing an assertion by a cabinet member that he was entitled to absolute immunity, the Court 'denied that absolute immunity was incident to that position; the

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36. *Id.*

37. *See generally* Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique,* 72 Nw. U.L. Rev. 526 (1977).

38. *Scheuer,* 416 U.S. at 47-48.

39. 438 U.S. 478 (1978).

40. *Harlow,* 102 S. Ct. at 2734. The Court noted that the factors of the power and importance of the office and the importance of "loyal and efficient subordinates" to the President were "insufficient to justify absolute immunity." *Id.*

Court's analysis in *Butz,* however, was more complete. There, and in other cases in which the Court has assessed the applicability of absolute immunity as incident to certain offices, the Court began its examination by analyzing three factors: the need, implicit in the duty performed, for freedom from harassment; the likelihood that vindictive litigation may follow from performance of the duty; and the protection afforded by safeguards within the system that prevent absolute immunity from being abused should it be granted.[41]

The *Harlow* Court, however, rejected the petitioners' claim to incidental immunity as senior presidential aides without more than cursorily lumping cabinet officials and senior White House staff into one group labeled "presidential subordinates."[42] In so doing, the Court neglected to recognize the different functions performed by presidential aides and the possibility that this might affect any examination of the three factors traditionally considered in granting or denying absolute immunity as incident to an office. Had the Court considered the three factors outlined in *Butz,* the Court would have found compelling reasons to grant absolute immunity to senior presidential aides as an incident of their offices.

First, performance of the duties of senior aides to the President requires freedom from harassment. It is the duty of senior presidential aides to determine which matters warrant presidential consideration. Having decided such consideration is needed, the aide must suggest a decision based on the merits of the matter. These suggestions concerning complex problems must often be made under exigent circumstances and with attendant political pressures that are at least as intense as the pressures surrounding judicial and prosecutorial decisions.

Second, the threat of harassing litigation is as real for senior

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41. 438 U.S. 478, 508-17. The three factors similarly came into play in Nixon v. Fitzgerald, 102 S. Ct. 2690. There, in holding the President of the United States is entitled to absolute immunity, the Court considered the need for the President, "the officeholder [who] must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system," to be able to deal fearlessly and impartially with the duties of his office. 102 S. Ct. at 2703 (footnote omitted). The Court then recognized the "sheer prominence of the President's office" made it "an easily identifiable target for suits for civil damages." *Id.* The Court concluded by enumerating the safeguards against misconduct by the Chief Executive that would operate to prevent abuse of absolute immunity. These safeguards included impeachment, scrutiny by Congress and the press, and the desire to earn reelection. *Id.* at 2706.

42. *Harlow,* 102 S. Ct. at 2733-34.

presidential aides as it is for judicial and prosecutorial officials. Senior aides to the President are highly visible and make or implement a multitude of decisions that are extremely unpopular with many constituents.

Finally, safeguards other than civil suit are available to restrain the actions of senior presidential aides. The protections, to some extent, are the same as those the Court examined in granting absolute immunity as incident to the office of President in *Nixon v. Fitzgerald.* These include oversight by Congress, the press, and the President himself.

Because the Court failed to perform this type of analysis, its assertion that it follows a "functional approach" in immunity decisions[43] rings hollow and leaves its conclusion that senior presidential aides are not entitled to absolute immunity open to question.

2. *Derivative immunity*

The Court's explanation of the inapplicability of the doctrine of derivative immunity to the Office of the President was also unconvincing. In *Gravel v. United States*[44] the Court recognized the need for aides of members of Congress to receive some measure of the absolute immunity granted to congressmen by the speech and debate clause.[45] The Court noted:

> [I]t is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; . . . the *day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos;* and that if they are not so recognized, the central role of the Speech or

43. *Id.* at 2735.

44. 408 U.S. 606 (1972).

45. While the speech or debate clause, which is the source of legislators' absolute immunity, provides merely that "for the Speech or Debate in either House, Members shall not be questioned in any other place," U.S. CONST. art. I, § 6, cl. 1, the Court has read the clause liberally to provide legislative immunity for any legislative activity, including participation in committees or conferences and in reports concerning legislative activities. Gravel v. United States, 408 U.S. 606, 625 (1972). The broad reading of the clause is prompted by the Court's perception that the clause was "designed to assure a co-equal branch of the government wide freedom of speech, debate and deliberation without intimidation or threats from the Executive Branch . . . and accountability before a possible hostile judiciary." *Id.* at 616-17.

> Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary . . . —will inevitably be diminished and frustrated.[46]

In *Nixon v. Fitzgerald*[47] the Court granted the Chief Executive absolute immunity from civil liability for his official actions. Absolute immunity was seen as necessary both to preserve the independence of the executive branch within the context of the separation of powers doctrine[48] and to prevent distraction of "a President from his public duties, to the detriment not only of the President and his office but also the Nation that the Presidency was designed to serve."[49]

In holding that senior aides to the President are not entitled to derivative immunity, the Court withheld from them the protection given to congressional aides. The Court justified its denial of derivative immunity on two grounds. First, the Court argued that derivative immunity for presidential aides was implicitly rejected in *Butz*.[50] Second, the Court felt that "undifferentiated extension" of derivative immunity to presidential aides was not cognizable within a functional analysis.[51]

The Court's first rationale for denying derivative immunity seems to stem from a misapplication of the functional analysis. In determining whether or not to apply derivative immunity the inquiry should not focus on the amount of discretion or responsibility attached to the office for which immunity is sought. Rather, the focus should center about the need of the principal (e.g., the Member of Congress in *Gravel*) for assistance in performing, free of harassment and intimidation, those special duties of his office that prompted application of absolute immunity. Thus, in *Gravel*, to determine the need for derivative immunity the Court constructed a functional analysis of the leg-

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46. 408 U.S. at 616-17 (emphasis added).

47. 102 S. Ct. 2690 (1982).

48. *Id.* at 2701. The Court said, "We consider this immunity 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." *Id.*

49. *Id.* at 2703.

50. *Harlow*, 102 S. Ct. at 2734. No mention is made in *Butz* of either *Gravel* or the doctrine of derivative immunity, reaffirming Justice Powell's assertion that it had been *impliedly* rejected. *See* 438 U.S. 478 (1978). Chief Justice Burger, dissenting, countered the majority's assertion by distinguishing *Butz*. He argued that senior aides to the President work more intimately on a daily basis with the President as implementors of his decision than does a cabinet officer. *Harlow*, 102 S. Ct. at 2744 (Burger, C.J., dissenting).

51. *Harlow*, 102 S. Ct. at 2735.

islative process in the context of our governmental scheme and "in light of 20th-century realities."[52] The *Gravel* Court did not examine the hierarchical positions of particular legislative aides as a part of their analytical process.[53]

Similarly, a proper inquiry in the *Harlow* case would have taken into account the Chief Executive's inability to perform all the constitutionally mandated and absolutely protected duties that accompany the Office without the assistance of some aides and advisors who serve as presidential alter egos. Next would follow a consideration of the potentially negative impact that would result should those duties that a President delegates to his aides become only qualifiedly protected. Since application of derivative immunity does not depend on rank or position in the hierarchy but depends rather on the function performed by a person in relation to the duties of the principal, it is "in no sense inconsistent to hold that a President's personal aides have greater immunity than cabinet officers."[54] While Cabinet officers may, at times, advise the President or implement his policies through their own administrative positions, the familiarity of this relationship in no sense approaches the intimacy of the relationship between the President and his senior aides.[55]

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52. *Id.* at 2741 (Burger, C.J., dissenting). In *Gravel* the Court wrote that the purpose behind construing the speech or debate clause liberally (so as to grant *aides* derivative immunity) was to free "the legislator from executive and judicial oversight that realistically threatens to control his conduct as the legislator." 408 U.S. at 618. Further indicating that the proper focus of an inquiry into application of derivative immunity is the superior, the *Gravel* Court stated that "the privilege applicable to the aide is viewed, as it must be, as the privilege of the [Member] . . . . " *Id.* at 621-22.

53. 408 U.S. at 616-22. In Barr v. Matteo, 360 U.S. 564 (1959), Justice Harlan explained the relationship of rank to application of absolute immunity. He said:

> [T]he 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, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.

Id. at 572-73 (footnote omitted).

54. *Harlow,* 102 S. Ct. at 2744 (Burger, C.J., dissenting).

55. Although in recent years some men have served both as Cabinet members and senior staff advisors (e.g., Henry Kissinger, who held both posts simultaneously), the duality of their individual roles merely serves to show the two positions are not mutually exclusive. This realization, however, does no violence to the idea that, when acting as a presidential advisor rather than as an administrator of an executive department, the individual is aiding the President in carrying out the President's own constitutionally mandated duties. This is a separate function from those individual administrative duties that are assigned to the Cabinet member by virtue of presidential appointment and congres-

Although functions of the senior staff will vary within individual administrations, in each modern Presidency there has typically been a coterie of persons who work literally at the President's elbow.[56] These aides communicate daily with the President, channeling information, contributing their advice, and implementing presidential decisions and policies. These senior advisors thus function as vital cogs in the structure that is termed the "inner workings"[57] of the Office of the President.

It was with the idea of protecting these inner workings from undue scrutiny and harassment that the Court in *Nixon v. Fitzgerald* granted the President absolute immunity for his official acts.[58] This protection is substantially undercut by denying derivative immunity to those aides who function as presidential alter egos. Without derivative immunity for his aides, the Presidency is absolutely protected from the harassment of civil suit only to the extent the President personally collects information, implements a decision, or, as in *Harlow,* dismisses a federal employee. It was a recognition of the heavy burden this highly individualized absolute immunity placed on modern-day legislators that lead to the Court's holding in *Gravel* that legislative aides are derivatively immune when they perform legislative tasks for members of Congress that the legislators are not personally able to perform for themselves. The legislator's workload and consequent need to delegate, coupled with the perceived need for freedom from harassment, operated to justify the decision in *Gravel.*[59] Certainly these considerations should be no less compelling in the context of the Presidency. The *Harlow* Court's refusal to apply derivative immunity to the president's senior aides leaves the office vulnerable to those very hazards from which the Court effectively shielded members of Congress in *Gravel* and from which it sought to shield the Presidency in *Nixon v. Fitzgerald.*

The Court's second reason for denying derivative immunity refects fear that an undifferentiated extension of derivative immunity to presidential advisors would not be compatible with a functional analysis.[60] However, applications of derivative immu-

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sional approval.

56. *Harlow,* 102 S. Ct. at 2742 (Burger, C.J., dissenting).

57. *Id.*

58. Nixon v. Fitzgerald, 102 S. Ct. at 2708 (Burger, C.J., concurring).

59. 408 U.S. at 616-17.

60. The Court stated, "The undifferentiated extension of absolute 'derivative' im-

nity to the senior level of presidential aides could scarcely be more "undifferentiatedly extended" than was the derivative immunity applied to that singularly unhomogenized group identified in *Gravel* merely as legislative aides.[61] Broadness of label does not tarnish the integrity of the functional approach. The absolute immunity it extends to certain officials is limited to protect only those actions taken in furtherance of a particular, identified function that may be only a part of the job an official performs. Thus, while a state prosecutor is absolutely immune for his actions in his judicial function, this absolute immunity is not extended to shield actions outside this function. Accordingly the prosecutor is not absolutely protected from a civil suit based upon performance of the investigative or administrative duties of his position.[62] Similarly, presidential aides would enjoy derivative immunity only to the extent that they were actually functioning as presidential alter egos.

The doctrine of derivative immunity thus operates to grant absolute immunity to aides only when they are performing those functions previously deemed absolutely protected. That is, a legislative aide is only absolutely immune while he performs those legislative acts encompassed within the protection of the speech or debate clause. The *Harlow* Court feared that application of derivative immunity in the instant case would set scores of aides above the law—free to run amok in the Office of the President.[63]

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munity to the president's aides therefore could not be reconciled with the 'functional' approach that has characterized the immunity decisions of this Court, indeed including *Gravel* itself." *Harlow*, 102 S. Ct. at 2735 (footnote omitted).

61. Staff allotments for Senators range from 17 to 70 persons in addition to committee staff aides who also perform legislative functions for Senators. House Members employ 18 to 26 aides plus committee staff aides. *Harlow*, 102 S. Ct. at 2741 n.3 (Burger, C.J., dissenting).

In *Gravel* the Court made a wholesale grant of derivative immunity to all of these aides, noting:

> We have little doubt that we are neither exceeding our judicial powers nor mistakenly construing the Constitution by holding that the Speech or Debate Clause applied not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself.

408 U.S. 618.

62. Imbler v. Pachtman, 424 U.S. 409, 430 (1976). *See* Mancini v. Lester, 630 F.2d 990, 992-93 (3d Cir. 1980); Forsyth v. Kleindienst, 599 F.2d 1203, 1213-14 (3d Cir. 1979) (prosecutors do not enjoy absolute immunity for actions taken in administrative and investigative capacities). For a discussion of *Imbler* in the context of other functional approach cases see *Butz*, 438 U.S. at 508-17.

63. The *Harlow* Court expressed fears that application of absolute immunity to officials who possess great power " 'affords a greater potential for a regime of lawless con-

In light of an examination of the proper function and focus of derivative immunity as set forth in *Gravel,* however, the nightmare posited by the Court begins to fade. As it fades, so, too, does the logic the Court employed to deny derivative immunity to senior presidential aides.

3. Special functions immunity

In the final portion of the Court's opinion concerning absolute immunity, the Court suggested, "For aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest."[64] The statement represents an exception to the Court's holding that, generally, senior aides to the President are not entitled to absolute immunity. The exception is a narrow one requiring prospective absolute-immunity candidates to prove that they perform a special function and that it was during the performance of this special function that the challenged conduct occurred.[65]

There are at least two drawbacks to the special functions exception. First, the requirement that an aide plead and prove a special function to gain absolute immunity removes in large part the essence of the absolute immunity privilege—freedom from participation in civil litigation. The *Harlow* Court's decision to bar discovery until the threshold immunity question is resolved in both qualified immunity and special immunity cases further diminishes the difference between special function absolute immunity and qualified immunity.

Second, in the case of senior presidential advisors the special functions exception could be applied only in piecemeal fashion since the Court would require judicial inquiry into the nature of each aide's functions within each President's administration.[66] Just as the *Harlow* case came before the Court seven years after the end of the presidential administration that employed the petitioners, it is conceivable that before the courts

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duct.' " *Harlow,* 102 S. Ct. at 2734 (quoting *Butz,* 438 U.S. at 506).

64. *Harlow,* 102 S. Ct. at 2735 (footnote omitted).

65. *Id.* at 2736.

66. The Court wrote, "In our view it is impossible to generalize about the role of 'offices' in an individual President's administration without reference to the functions that *particular officeholders* are assigned by the President." 102 S. Ct. at 2734 n.14 (emphasis added).

could determine whether an aide was performing a special function within a particular administration that question would become moot. Thus, if aides must litigate to attain special functions status, the chilling effect on the vigor and efficiency of the Office of the President fostered by the denial of derivative immunity persists even in the application of the special functions exception.

B. The New Qualified Immunity Standard

The qualified immunity test specified in *Wood v. Strickland*[67] denied the qualified immunity defense when an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff] or if he took the action with malicious intention to cause a deprivation of constitutional rights or other injury."[68] In *Butz*, after denying absolute immunity to federal executive officials, the Court sought to minimize the social costs[69] attendant upon allowing litigation against government defendants by admonishing judges to dismiss frivolous suits on a motion for summary judgment through firm application of the Federal Rules of Civil Procedure. This goal was blocked, however, by that part of the test for qualified immunity requiring that, prior to accepting the defense of qualified immunity, the court find that an official had acted without malice. This subjective aspect of the test put an official's personal good faith into question and made a decision on the applicability of the good-faith immunity a question of fact that some courts felt was intrinsically a jury question.[70]

In *Harlow* the Court deleted the subjective malicious-intent

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67. 420 U.S. 308 (1975).

68. *Id.* at 322.

69. The social costs of permitting civil suit against government officials, in addition to the costs of litigation, include distraction from public business, deterrence from performing the decisionmaking function with vigor, and deterrence of able citizens from entering public service. *See* Freed, *supra* note 37, at 529.

70. The Court explained:

> The subjective element of the good faith defense frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.

Harlow, 102 S. Ct. at 2737-38 (footnotes omitted).

portion of the test.[71] Thus, the *Harlow* test for qualified immunity is really just the remaining objective half of the *Wood* test. It requires government officials to show their conduct did not violate established constitutional or statutory rights of which a person reasonably would have known. The Court gave new emphasis, however, to a twist in the rule that had previously been applied only in *Wood*. In *Wood* the Court used the phrase "knew or should have known" rather than the previously applied "reasonably knew" standard. This modification put in issue the government official's personal state of mind at the time of the challenged act rather than stopping at a finding of what would have been in the collective minds of similarly situated reasonable men. In *Wood* the Court expressly limited the holding to its specific facts.[72] Although the *Wood* formulation was subsequently cited as a statement summarizing qualified immunity principles, *Harlow* for the first time establishes the rule as the general standard.[73] Thus, as Justice Brennan noted, "This standard would not allow the official who *actually knows* that he was violating the law to escape liability for his actions, even if he could not 'reasonably have been expected' to know what he actually did know."[74]

While this standard has the added benefit of capturing that exceptionally wily violator who is so well versed in the body of developing law that he knows, before a reasonable man would know, that as he acts he does wrong, the addition of "knew" to the substantive standard seems to sow the seeds of a new and equally problematic inquiry even before the memory of the old subjective injury begins to fade. Add to this the Court's admonition that until the threshold inquiry into immunity is resolved, discovery should be barred, and the new standard places courts in the unenviable position of having to determine exactly what a public-official defendant "knew" at the time he acted without more than the defendant's assertion of good faith to guide them.

Justice Brennan, concurring, suggested a workable solution to the dilemma.[75] A motion for summary judgment can succeed independently of a resolution of the knowledge question either on the ground that the plaintiff cannot prove violation of his

71. *Harlow*, 102 S. Ct. at 2738.
72. 420 U.S. at 322 (1974).
73. *Harlow*, 102 S. Ct. at 2737 n.25.
74. *Id.* at 2740 (Brennan, J., concurring) (emphasis in original).
75. *Id.*

constitutional rights or on the ground that the state of the law was so ambiguous at the time of the alleged violation that no one could have knowingly violated the law.[76] Justice Brennan suggested that on a motion for summary judgment on grounds similar to these, the court should defer discovery on a defendant's knowledge while the decision on the motion is pending.[77]

Of course there may arise a situation in which a plaintiff can show both a violation of his constitutional rights and that the law at the time of the alleged violation could neither be said to be clearly established nor totally ambiguous. In that circumstance some limited discovery into what a defendant official knew should be allowed. Generally, however, by pruning the qualified immunity standard of its subjective prong, the *Harlow* court significantly increases the likelihood that insubstantial suits will be weeded out prior to trial.

III. Conclusion

By denying absolute immunity to those aides who are, in essence, the alter egos of the President, the Court inexplicably disrupts traditional notions of separation of powers and inflicts on the office of the Chief Executive the same possibility of intimidation by harassment that prompted the Court to declare the President absolutely immune in *Nixon v. Fitzgerald* and legislative aides derivatively immune in *Gravel.*

The reformulated standard for qualified immunity will reduce the negative impact that the threat of civil suit has on the efficiency and vigor of government officials by reducing the number of insubstantial suits that proceed to trial and by limiting the disruptive effects of discovery until after the question of qualified immunity is resolved. The new standard is still, however, only a screen and not a shield from civil liability. In the case of civil suits against senior aides to the President of the United States, application of even the new, more finely meshed standard is insufficient to remedy the fundamental impairment to the vigor of the Office of the President that results from exposure of its inner workings to civil suits.

Lynda Cook

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76. *Id. Cf.* Barr v. Matteo, 360 U.S. 564 (1959) (federal officials are absolutely immune from suit for common law torts).

77. *Harlow,* 102 S. Ct. at 2740 (Brennan, J., concurring).