AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 10: The Reagan Era – Separation of Powers

Harlow, et al. v. Fitzgerald, 457 U.S. 800 (1982)

A. Ernest Fitzgerald was a management analyst in the Department of the Air Force until he was terminated in 1970.. Fitzgerald had been a whistleblower on waste and mismanagement in the Pentagon and had testified before Congress in 1968. His dismissal in the new administration created a political stir, including White House and congressional attention. He filed a complaint with the Civil Service Commission, which generated a public hearing his claim that President Richard Nixon and other administration officials illegally fired him for his whistleblowing activities (the administration claimed that Fitzgerald was terminated as part of a general employment reduction). The Commission denied Fitzgerald's claim, and he filed suit in federal district court arguing that Bryce Harlow and Alexander Butterfield engaged in a conspiracy to violate his rights by unlawfully terminating him. Harlow and Butterfield were senior White House aides, and they responded that they were immune from civil suits deriving from their officials acts (and had not been involved in any illegal conspiracies). The district court allowed the suit to proceed, and a circuit court affirmed that decision. Harlow and Butterfield appealed to the U.S. Supreme Court arguing that they had immunity from civil suits for their official actions as presidential aides. In a 8–1 decision, the Court remanded the case to the trial court to determine whether Fitzgerald could overcome a modified test of qualified immunity.

The Court's majority recognized a qualified immunity for the official acts of presidential aides, allowing such aides to offer a substantive defense to suits that they had acted in good faith. At the same time, the Court modified the existing test in order to emphasize objective questions of whether the actions violated the law and to deemphasize subjective questions of whether officials acted with a malicious intention. The Court decided another case by Fitzgerald on the same day, recognizing an absolute immunity for President Nixon in his official actions. Chief Justice Burger dissented from the view that the president and his aides should be subjected to different forms of immunity and would have dismissed the case. In deciding the case, the Court was confronted with divergent precedents on official immunity. In this case, the majority determined that presidential aides should be treated more like Cabinet members (who enjoyed qualified immunity) rather than legislative aides (who enjoyed absolute immunity).

Why might presidential aides be treated differently than the president himself? Why might executive branch officials be treated differently than legislative branch officials? Are objective standards of qualified immunity sufficient to protect the operation of the presidency and the separation of powers? Can these several cases be reconciled or should the Court have overturned some precedents on official immunity in this case?

JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is the scope of the immunity available to the senior aides and advisers of the President of the United States in a suit for damages based upon their official acts.

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As we reiterated today in *Nixon v. Fitzgerald* (1982), our decisions consistently have held that government officials are entitled to some form of immunity from suits for damages. As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability.

Our decisions have recognized immunity defenses of two kinds. For officials whose special functions or constitutional status requires complete protection from suit, we have recognized the defense of "absolute immunity." . . .

For executive officials in general, however, our cases make plain that qualified immunity represents the norm. . . .

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Having decided in *Butz v. Economou* (1977) that Members of the Cabinet ordinarily enjoy only qualified immunity from suit, we conclude today that it would be equally untenable to hold absolute immunity an incident of the office of every Presidential subordinate based in the White House. Members of the Cabinet are direct subordinates of the President, frequently with greater responsibilities, both to the President and to the Nation, than White House staff. The considerations that supported our decision in *Butz* apply with equal force to this case. It is no disparagement of the offices held by petitioners to hold that Presidential aides, like Members of the Cabinet, generally are entitled only to a qualified immunity.

In disputing the controlling authority of *Butz*, petitioners rely on the principles developed in *Gravel v. United States* (1972). In *Gravel* we endorsed the view that "it is literally impossible . . . for Members of Congress to perform their legislative tasks without the help of aides and assistants" and that "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 . . . ." Having done so, we held the Speech and Debate Clause derivatively applicable to the "legislative acts" of a Senator's aide that would have been privileged if performed by the Senator himself.

Petitioners contend that the rationale of *Gravel* mandates a similar "derivative" immunity for the chief aides of the President of the United States. Emphasizing that the President must delegate a large measure of authority to execute the duties of his office, they argue that recognition of derivative absolute immunity is made essential by all the considerations that support absolute immunity for the President himself.

Petitioners' argument is not without force. Ultimately, however, it sweeps too far. If the President's aides are derivatively immune because they are essential to the functioning of the Presidency, so should the Members of the Cabinet -- Presidential subordinates some of whose essential roles are acknowledged by the Constitution itself -- be absolutely immune. Yet we implicitly rejected such derivative immunity in *Butz*. Moreover, in general our cases have followed a "functional" approach to immunity law. We have recognized that the judicial, prosecutorial, and legislative functions require absolute immunity. But this protection has extended no further than its justification would warrant. . . .

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. . . . In order to establish entitlement to absolute immunity a Presidential aide first must show that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability. He then must demonstrate that he was discharging the protected function when performing the act for which liability is asserted.

Applying these standards to the claims advanced by petitioners Harlow and Butterfield, we cannot conclude on the record before us that either has shown that "public policy requires [for any of the functions of his office] an exemption of [absolute] scope." . . . Nor, assuming that petitioners did have functions for which absolute immunity would be warranted, could we now conclude that the acts charged in this lawsuit -- if taken at all -- would lie within the protected area. . . .

The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative. In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees. . . . At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty -- at a cost not only to the defendant officials, but to society as a whole. . . .

Qualified or "good faith" immunity is an affirmative defense that must be pleaded by a defendant official. Decisions of this Court have established that the "good faith" defense has both an "objective" and a "subjective" aspect. The objective element involves a presumptive knowledge of and respect for "basic, unquestioned constitutional rights." The subjective component refers to "permissible intentions." . . .

In the context of *Butz'* attempted balancing of competing values, it now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial -- distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind. Immunity generally is available only to officials performing discretionary functions. In contrast with the thought processes accompanying "ministerial" tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment. Yet they also frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.

Consistently with the balance at which we aimed in *Butz*, we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

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By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences."

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The judgment of the Court of Appeals is vacated, and the case is remanded for further action consistent with this opinion.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL and JUSTICE BLACKMUN, concurring.

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JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN, concurring.

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JUSTICE REHNQUIST, concurring.

At such time as a majority of the Court is willing to reexamine our holding in *Butz*, I shall join in that undertaking with alacrity. But until that time comes, I agree that the Court's opinion in this case properly disposes of the issues presented, and I therefore join it.

CHIEF JUSTICE BURGER, dissenting.

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In this case the Court decides that senior aides of the President do not have derivative immunity from the President. I am at a loss, however, to reconcile this conclusion with our holding in *Gravel*. The Court reads *Butz*, as resolving that question; I do not. *Butz* is clearly distinguishable.

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I joined in that analysis and continue to agree with [*Gravel*], for without absolute immunity for these "elbow aides," who are indeed "alter egos," a Member could not effectively discharge all of the assigned constitutional functions of a modern legislator.

The Court has made this reality a matter of our constitutional jurisprudence. How can we conceivably hold that a President of the United States, who represents a vastly larger constituency than does any Member of Congress, should not have "alter egos" with comparable immunity? To perform the constitutional duties assigned to the Executive would be "literally impossible, in view of the complexities of the modern [Executive] process, . . . without the help of aides and assistants." . . .

For some inexplicable reason the Court declines to recognize the realities in the workings of the Office of a President, despite the Court's cogent recognition in *Gravel* concerning the realities of the workings of 20th-century Members of Congress. . . .

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The Court's analysis in *Gravel* demonstrates that the question of derivative immunity does not and should not depend on a person's rank or position in the hierarchy, but on the function performed by the person and the relationship of that person to the superior. Cabinet officers clearly outrank United States Attorneys, yet qualified immunity is accorded the former and absolute immunity the latter; rank is important only to the extent that the rank determines the function to be performed. The function of senior Presidential aides, as the "alter egos" of the President, is an integral, inseparable part of the function of the President. . . .

. . . . I find it inexplicable why the Court makes no effort to demonstrate why the Chief Executive of the Nation should not be assured that senior staff aides will have the same protection as the aides of Members of the House and Senate.