AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 10: The Reagan Era – Separation of Powers

Nixon v. Fitzgerald, 457 U.S. 731 (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, attracting White House and congressional attention. He filed a complaint with the Civil Service Commission, which resulted in a public hearing and an eventual claim by President Richard Nixon that he was responsible for firing Fitzgerald. The Commission denied Fitzgerald's claim, and he filed suit in federal district court arguing for wrongful termination. After an extended legal process, Fitzgerald eventually named the former Nixon as one of the parties to the lawsuit. The district court allowed the suit to proceed, which a circuit court affirmed. Nixon appealed to the U.S. Supreme Court arguing that he had immunity from civil suits for his official actions as president. In a 5–4 decision, the Court agreed and reversed the lower courts.

The Court's majority embraced an expansive absolute immunity from legal proceedings for the president in his official acts. The Court argued that unlike most government officials, but like judges and prosecutors, the president must have absolute immunity from personal liability in order to fulfill the requirements of the office. Such immunity was necessary both to protect the unique operation of the executive office and to prevent unnecessary interference with presidential functions by the other branches.

What makes the presidential office unique? Do the distinctive features of the presidency entitle that office to more protection from judicial process than what other government officials enjoy? Should presidential immunity from judicial processes extend beyond liability for official acts? Is the president properly checked by other means even if he or she is immune from legal liability? Is immunity constitutionally required, or is this an immunity rooted solely in considerations of public policy? Should Congress be able to override such judicially recognized immunity? Should protection from judicial processes be blocked entirely, or merely delayed until after the president leaves office? Can trial courts be trusted to properly manage legal suits against the president?

JUSTICE POWELL delivered the opinion of the Court.

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This Court consistently has recognized that government officials are entitled to some form of immunity from suits for civil damages. . . . Drawing upon principles of immunity developed in English cases at common law, the Court [has] concluded that "[the] interests of the people" required a grant of absolute immunity to public officers. In the absence of immunity, the Court reasoned, executive officials would hesitate to exercise their discretion in a way "injuriously [affecting] the claims of particular individuals," even when the public interest required bold and unhesitating action. Considerations of "public policy and convenience" therefore compelled a judicial recognition of immunity from suits arising from official acts.

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This case now presents the claim that the President of the United States is shielded by absolute immunity from civil damages liability. In the case of the President the inquiries into history and policy,

though mandated independently by our cases, tend to converge. Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional heritage and structure. Historical inquiry thus merges almost at its inception with the kind of "public policy" analysis appropriately undertaken by a federal court. This inquiry involves policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers.

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The President occupies a unique position in the constitutional scheme. Article II, § 1, of the Constitution provides that "[the] executive Power shall be vested in a President of the United States . . . ." This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. . . .

In arguing that the President is entitled only to qualified immunity, the respondent relies on cases in which we have recognized immunity of this scope for governors and cabinet officers. . . . We find these cases to be inapposite. The President's unique status under the Constitution distinguishes him from other executive officials.

Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. As is the case with prosecutors and judges – for whom absolute immunity now is established -- a President must concern himself with matters likely to "arouse the most intense feelings." Yet, as our decisions have recognized, it is in precisely such cases that there exists the greatest public interest in providing an official "the maximum ability to deal fearlessly and impartially with" the duties of his office. . . . This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system. Nor can the sheer prominence of the President's office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve.

Courts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint. For example, while courts generally have looked to the common law to determine the scope of an official's evidentiary privilege, we have recognized that the Presidential privilege is "rooted in the separation of powers under the Constitution." *United States v. Nixon* (1974) . . . But our cases also have established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch. . . .

. . . . In view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the "outer perimeter" of his official responsibility.

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A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive. There remains the constitutional remedy of impeachment. In addition, there are formal and informal checks on Presidential action that do not apply with equal force to other executive officials. The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment. Other incentives to avoid misconduct may include a desire to earn reelection, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature.

The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President "above the law." For the President, as for judges and prosecutors, absolute immunity

merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.

For the reasons stated in this opinion, the decision of the Court of Appeals is *reversed* . . . .

CHIEF JUSTICE BURGER, concurring.

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Exposing a President to civil damages actions for official acts within the scope of the Executive authority would inevitably subject Presidential actions to undue judicial scrutiny as well as subject the President to harassment. The enormous range and impact of Presidential decisions . . . inescapably means that many persons will consider themselves aggrieved by such acts. Absent absolute immunity, every person who feels aggrieved would be free to bring a suit for damages, and each suit . . . would involve some judicial questioning of Presidential acts, including the reasons for the decision, how it was arrived at, the information on which it was based, and who supplied the information. Such scrutiny of day-to-day decisions of the Executive Branch would be bound to occur if civil damages actions were made available to private individuals. Although the individual who claims wrongful conduct may indeed have sustained some injury, the need to prevent large-scale invasion of the Executive function by the Judiciary far outweighs the need to vindicate the private claims. . . .

Judicial intervention would also inevitably inhibit the processes of Executive Branch decisionmaking and impede the functioning of the Office of the President. The need to defend damages suits would have the serious effect of diverting the attention of a President from his executive duties since defending a lawsuit today – even a lawsuit ultimately found to be frivolous – often requires significant expenditures of time and money, as many former public officials have learned to their sorrow. . . .

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JUSTICE WHITE, joined by JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN, dissenting.

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The Court intimates that its decision is grounded in the Constitution. If that is the case, Congress cannot provide a remedy against Presidential misconduct and the criminal laws of the United States are wholly inapplicable to the President. I find this approach completely unacceptable. I do not agree that if the Office of President is to operate effectively, the holder of that Office must be permitted, without fear of liability and regardless of the function he is performing, deliberately to inflict injury on others by conduct that he knows violates the law.

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In *Marbury v. Madison* (1803), the Court, speaking through The Chief Justice, observed that while there were "important political powers" committed to the President for the performance of which neither he nor his appointees were accountable in court, "the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act." The Court nevertheless refuses to follow this course with respect to the President. It makes no effort to distinguish categories of Presidential conduct that should be absolutely immune from other categories of conduct that should not qualify for that level of immunity. The Court instead concludes that whatever the President does and however contrary to law he knows his conduct to be, he may, without fear of liability, injure federal employees or any other person within or without the Government.

Attaching absolute immunity to the Office of the President, rather than to particular activities that the President might perform, places the President above the law. It is a reversion to the old notion that the King can do no wrong. Until now, this concept had survived in this country only in the form of sovereign immunity. That doctrine forecloses suit against the Government itself and against Government

officials, but only when the suit against the latter actually seeks relief against the sovereign. Suit against an officer, however, may be maintained where it seeks specific relief against him for conduct contrary to his statutory authority or to the Constitution. Now, however, the Court clothes the Office of the President with sovereign immunity, placing it beyond the law.

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Taken at face value, the Court's position that as a matter of constitutional law the President is absolutely immune should mean that he is immune not only from damages actions but also from suits for injunctive relief, criminal prosecutions and, indeed, from any kind of judicial process. But there is no contention that the President is immune from criminal prosecution in the courts under the criminal laws enacted by Congress or by the States for that matter. Nor would such a claim be credible. The Constitution itself provides that impeachment shall not bar "Indictment, Trial, Judgment and Punishment, according to Law." Similarly, our cases indicate that immunity from damages actions carries no protection from criminal prosecution.

Neither can there be a serious claim that the separation-of-powers doctrine insulates Presidential action from judicial review or insulates the President from judicial process. No argument is made here that the President, whatever his liability for money damages, is not subject to the courts' injunctive powers. . . . While the Speech or Debate Clause guarantees that "for any Speech or Debate" Congressmen "shall not be questioned in any other Place," and, thus, assures that Congressmen, in their official capacity, shall not be the subject of the courts' injunctive powers, no such protection is afforded the Executive. Indeed, as the cases cited above indicate, it is the rule, not the exception, that executive actions -- including those taken at the immediate direction of the President -- are subject to judicial review. Regardless of the possibility of money damages against the President, then, the constitutionality of the President's actions or their legality under the applicable statutes can and will be subject to review. Indeed, in this very case, respondent Fitzgerald's dismissal was set aside by the Civil Service Commission as contrary to the applicable regulations issued pursuant to authority granted by Congress.

Nor can private damages actions be distinguished on the ground that such claims would involve the President personally in the litigation in a way not necessitated by suits seeking declaratory or injunctive relief against certain Presidential actions. The President has been held to be subject to judicial process at least since 1807. . . . Chief Justice Marshall flatly rejected any suggestion that all judicial process, in and of itself, constitutes unwarranted interference in the Presidency:

> "The guard, furnished to this high officer, to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstance which is to precede their being issued." *United States v. Burr*, 25 F. Cas. 30 (CC Va. 1807).

This position was recently rearticulated by the Court in *United States v. Nixon* (1974). . . .

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The principle that should guide the Court in deciding this question was stated long ago by Chief Justice Marshall: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison* (1803). . . .

The possibility of liability may, in some circumstances, distract officials from the performance of their duties and influence the performance of those duties in ways adverse to the public interest. But when this "public policy" argument in favor of absolute immunity is cast in these broad terms, it applies to all officers, both state and federal: All officers should perform their responsibilities without regard to those personal interests threatened by the possibility of a lawsuit. . . .

The Court's response, until today, to this problem has been to apply the argument to individual functions, not offices, and to evaluate the effect of liability on governmental decision-making within that function, in light of the substantive ends that are to be encouraged or discouraged. . . .

. . . . [T]he only question that must be answered here is whether the dismissal of employees falls within a constitutionally assigned executive function, the performance of which would be substantially impaired by the possibility of a private action for damages. I believe it does not. . . .

The argument that Congress, by providing a damages action under these statutes (as is assumed in this case), has adopted an unconstitutional means of furthering its ends, must rest on the premise that Presidential control of executive employment decisions is a constitutionally assigned Presidential function with which Congress may not significantly interfere. This is a frivolous contention. . . .

Absolute immunity is appropriate when the threat of liability may bias the decisionmaker in ways that are adverse to the public interest. But as the various regulations and statutes protecting civil servants from arbitrary executive action illustrate, this is an area in which the public interest is demonstrably on the side of encouraging less "vigor" and more "caution" on the part of decisionmakers. . . .

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The suggestion that enforcement of the rule of law – *i. e.*, subjecting the President to rules of general applicability – does not further the separation of powers, but rather is in derogation of this purpose, is bizarre. At stake in a suit of this sort, to the extent that it is based upon a statutorily created cause of action, is the ability of Congress to assert legal restraints upon the Executive and of the courts to perform their function of providing redress for legal harm. Regardless of what the Court might think of the merits of Mr. Fitzgerald's claim, the idea that pursuit of legal redress offends the doctrine of separation of powers is a frivolous contention passing as legal argument.

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The majority may be correct in its conclusion that "[a] rule of absolute immunity . . . will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive." Such a rule will, however, leave Mr. Fitzgerald without an adequate remedy for the harms that he may have suffered. More importantly, it will leave future plaintiffs without a remedy, regardless of the substantiality of their claims. The remedies in which the Court finds comfort were never designed to afford relief for individual harms. Rather, they were designed as political safety valves. Politics and history, however, are not the domain of the courts; the courts exist to assure each individual that he, as an individual, has enforceable rights that he may pursue to achieve a peaceful redress of his legitimate grievances.

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

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