



10-1981

Harlow v. Fitzgerald

Lewis F. Powell Jr.

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[Fe 3/1/82]

Dick - Having to make
the changes suggested, after
your long and thoughtful
labours on this case, is
enough to make you
sigh.

Please don't!
Z 70

lfp/ss 03/01/82

MEMORANDUM

TO: Dick DATE: March 1, 1982
FROM: Lewis F. Powell, Jr.

80-945 Harlow

I think the Chambers draft of Februar 27 generally is excellent. I have raised a question or two, and suggested minor language changes.

As I reviewed the draft, I had in mind Byron's view that we should take this opportunity to confine the applicable standard to whether the official "knew or reasonably should have known that the action he took" was unconstitutional. In his view, the frustration of what the Court intended in Butz results primarily from the "malice" component of the Wood v. Strickland standard. Incidentally, Byron says this was first announced in an earlier decision. He agrees now that virtually every plaintiff can make a jury case by alleging malice - a subjective issue of an official's good faith. Although he recognizes that the "constitutional" standard - at least the "should have known" portion of it - may be viewed in some cases as subjective, this should be a question of law for a court to decide.

I am inclined to accept Byron's view for two reasons. First, I think he is basically right. Second, as he moved to this position last Term in his memorandum in

Nixon, and seems firmly of this opinion, we probably would have a badly fractured Court if I retain the "malice" component. Byron thinks - and he may be right - that the Chief and possibly even Rehnquist - would join this reformulation of the standard.

The principal negative, as we have discussed, is that it would be necessary partially to overrule prior decisions. This may be justified in light of experience.

I therefore suggest that you make the necessary revisions. The principal changes will be in Part IV. When we have a draft, I will submit it to John Stevens in view of our prior collaboration.

It may be, Dick, that this change would provide the protection against insubstantial suits going to trial that our present IV is intended to provide. If we make clear that the application of the standard normally presents a question of law, I may conclude that shifting the burden of proof is unnecessary. What do you think?

But first, I would like to see how adoption of an objective standard writes. I would make sure that the print shop retains the present draft, as possibly we may revert to it.

L.F.P., Jr.

ss

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L.F.P., Jr.

File

March 10, 1982

JOHN GINA-POW

To: Dick Fallon

From: LFP, Jr.

Subject: 80-945 - Harlow v. Fitzgerald

In a talk with Justice Stevens this morning, he advised that he will join Nixon as now written and thinks it is an excellent opinion.

Justice Stevens also likes the Harlow draft, but has some suggestions only one of which I view as substantive:

1. He would add to fn 10 (p.5) a more explicit reference to the subject of fn 36. We might simply add a sentence saying that the question whether a private cause of action may be inferred is not presented, and then refer to fn 36.

2. Referring to fn 16, page 10, John thinks that separation of powers considerations may be implicated to some extent by suits against high officials. I think he would be satisfied if we simply change the last sentence in

the note to read: " suits against other high officials - including presidential aides - generally do not to the same extent invoke the special separation of powers considerations...."

3. On page 13 we have the sentence that identifies the "societal costs". John likes what we have said, but would add, possibly in a separate sentence, the thought that decision making should not be affected by personal concerns of possible liability. We said this in Nixon. It would be easy to repeat it here.

4. As usual, John has some innovative ideas. He thinks that the Wood v. Strickland standard (referred to on p. 14) is internally inconsistent, and that the malice component is meaningless. For example, if it were found that the defendant neither knew nor reasonably should have known of the asserted constitutional right, how could there have been a malicious intention to violate it? Thus, John thinks that by abandoning the malice component we really aren't making a substantive change. He will give us some language for a note.

5. On page 18, John would like for us to add a note - perhaps in an existing note - a statement that there also often will be a recovery against the government itself, as was true in this case. John thinks we should repeat, briefly, as we said in Nixon, that Butterfield already has made a substantial recovery against the government.

6. Recognizing that he was "kicking me in the shins" a bit, John asked if I wouldn't recognize stare decisis enough to include in footnote 36 a reference to his opinion in Merrill Lynch, noting that it infers an intent of Congress to create a private cause of action where it deliberately accepted an established line of federal court decisions. Assuming that Merrill Lynch comes down before Harlow, I suppose I can do this. Incidentally, perhaps to make it easier for me, John says that from now on unless there has been a history similar to that in Merrill Lynch, he will be as strict as I have been about implying unexpressed damage suit rights.

7. Finally, and not surprising, he has reservations about our Part C (p. 19). He makes the arguable valid comment that there may be some question as to the source of our authority to change the burden of proof except where due process is implicated. John does say, and would be willing to accept a change on page 18, that judges appropriately should be able in most cases to decide whether an official reasonably could have been expected to know about the law.

Although I do not entirely agree that we lack the power to identify the burden of proof with respect to an immunity we have created, I am nevertheless inclined to omit sub-part C. I would, however, make the change in the last sentence in the first full paragraph on page 18 that he would accept.

Also, I would like to give Judge Gesell a more prominent billing than you have done. At one point in drafting Nixon, we had included both of the paragraphs from Gesell's opinion, one that emphasized the burdens of protracted litigation and the other that purposed a change in the burden of proof. I do not recall why we omitted these from Nixon. I certainly would like to include the former in Harlow. Gesell has tried a number of these cases, others will certainly come before him, and he is a respected district judge.

I suggest that you make the changes indicated above, and I will show them to Justice Stevens before we go back to the printer. I would like to be able to say to Justice White that the draft has been approved by Stevens.

LFP, JR.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 10, 1982

Re: 80-945 - Harlow & Butterfield v.
Fitzgerald

Dear Lewis:

Perhaps the footnote that I suggested could be added on to the end of footnote 24 on pages 14-15 and might read something like this:

"The two-pronged standard as phrased in Wood is, of course, somewhat redundant. For if it is determined that the defendant neither knew nor should have known that his conduct would violate the plaintiff's constitutional rights, it would necessarily follow that the defendant could not have acted with malicious intention to cause a deprivation of a constitutional right that defendant knew nothing about."

Respectfully,



Justice Powell

March 12, 1982

80-945 Harlow

Dear John:

Here is the draft (3/8/82) of my opinion in this case that you previously reviewed. Almost all of the changes indicated are made in response to your suggestions.

Two explanations may be helpful. First, I have made no reference in the final footnote (n. 37, p. 20) to your decision in Merrill Lynch. At the same time that I am trying to make your opinion look dreadfully wrong, it would look a bit curious to include it in another opinion I am circulating. When Merrill Lynch comes down, however, I will refer to it as our latest expression on implied actions.

Now, back to Harlow. In view of your reservations about Subpart C of Part IV (p. 19), I have substantially revised the prior draft. I very much hope the substance of the revision will have your approval and become a Court opinion, or at least command sufficient support to encourage District Courts to assume greater responsibility in cases of this kind. For example, if Judge Gesell had not felt constrained by the views of CADIC, I think it is evident from what he wrote in Halperin that he would have dismissed a case like this one on the basis of the plaintiff's marginal summary judgment showing.

We emphasized in Butz that District Courts should be able to identify early the insubstantial suits, and prevent them from dragging on for years - as is now taking place. The assumption that District Courts would be sensitive to their duty to do this underlies the distinction we have drawn between qualified and absolute immunity.

Again, I express my appreciation for your willingness to help me put the draft in a form that both of us can support before I circulate. I will await further word from you.

Sincerely,

Justice Stevens

lfp/ss

80-945

March 15, 1982

PERSONAL

Dear John:

Again I thank you for reviewing my Harlow draft, and the suggested revisions.

I consider your support essential. Sandra favors qualified immunity. But, unless the opinion persuades the Chief and Bill Rehnquist, they will go for absolute immunity. Whether Byron will be content with the way I have written Harlow remains to be seen. If he joins us, we will still need one of our Brothers who were with Byron last Term.

In this uncertain posture of the case, I would like to have Harlow satisfactory to you so that you could join promptly after circulation. I therefore am eliminating Subpart C. I would like, however, to keep a gentle admonition in the opinion somewhere, and suggest the enclosed footnote to be added as a paragraph on page 16 at the place indicated. The note is faithful to the Court's opinion in Butz.

I add, in response to your letter, that I do think Subpart C is well within the authority of the Court. Qualified immunity is a judge-made doctrine, and I would think we properly may define safeguards to its application. Because of the strong public interest in a case of this kind, it differs from the relevant considerations on summary judgment in the typical civil litigation. I make this point only in response to your view - but in recognition that you could be right.

Sincerely,

Justice Stevens

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 15, 1982

Re: 80-945 - Harlow & Butterfield v.
Fitzgerald

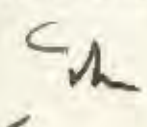
Dear Lewis:

Thank you for sending me a copy of your revised draft of the opinion. I think it is a fine job; it satisfies my concerns in all except the two respects you mentioned in your letter.

You are, of course, entirely correct in postponing any reference to Merrill Lynch until that case comes down.

Your rewrite of Subpart C of Part IV is a substantial improvement and certainly makes good sense but I am still troubled by our lack of power to amend the Federal Rules of Civil Procedure for one class of litigants. The problem is the same basic issue that separated us in cases like Duke Power, New York Telephone, Snepp, and most recently, Mite. In all of those cases, your vote was consistent with wise policy and mine may have reflected nothing but an out-of-date notion about the scope of our power. Nevertheless, I do not believe I will be able to join IV-C. I suggest that you circulate it in its present form anyway. It may well command a Court. I will not respond to it immediately, and ultimately may simply write a sentence or two noting my inability to join that portion of your opinion.

Respectfully,



Justice Powell

March 17, 1982

PERSONAL

80-945 Harlow

Dear Chief and Bill:

I am circulating this afternoon draft opinions in Nixon and Harlow.

Nixon is written, I believe, in full accord with your respective views. In writing Harlow, I have followed - as I feel obligated to do - the Court's decision in Butz v. Economou, a decision that I know displeases both of you. You will recall that last Term, in each of the eight separate drafts of my memorandum in the Kissinger case, I also applied the Butz qualified immunity rationale with respect to the claims against Kissinger, Mitchell and Halderman. I did recognize, however, that even where an official normally has qualified immunity only, certain functions are sufficiently sensitive to justify absolute protection, e.g., national defense.

I invite your attention today particularly to one major change that I have incorporated in the Harlow opinion. I propose a modification of the Wood v. Strickland standard to eliminate the "malice" component. Byron suggested this last Term, and I am happy to accede to the suggestion. My guess is that most of the protracted trials have resulted - as in this case - from allegations of subjective malice which generally create jury questions. In sum, if there is a Court for Harlow the way it is written, I think District Courts will be encouraged to identify and dismiss insubstantial claims.

I add that the apparent alternative to a Court along the lines of my draft is a fractured Court, perhaps splitting three ways that may leave the malice component in the standard, and the CADC opinion in Kissinger as the law at least of this Circuit.

Sincerely,

The Chief Justice
Justice Rehnquist

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 18, 1982

Re: 80-945 - Harlow and Butterfield
v. Fitzgerald

Dear Lewis:

If my presently circulating opinion in Merrill Lynch becomes a Court opinion, I will ask you to make a modest language change in footnote 35. On the assumption that we will have no difficulty agreeing on an appropriate change in that footnote, please join me in your opinion.

Respectfully,

SA

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 18, 1982

80-945 Harlow and Butterfield v. Fitzgerald

Dear John:

Thank you for your "join" in the above case.

This will confirm that I will add appropriate language in footnote 35 to reflect a Court opinion in Merrill Lynch. As I am dissenting in that case, and even though my cause may be "lost", I will await the final decision before making the change.

Sincerely,

Lewis

Justice Stevens

lfp/ss

cc: The Conference

March 18, 1982

80-945 Harlow and Butterfield v. Fitzgerald

Dear John:

Thank you for your "join" in the above case.

This will confirm that I will add appropriate language in footnote 35 to reflect a Court opinion in Merrill Lynch. As I am dissenting in that case, and even though my cause may be "lost", I will await the final decision before making the change.

Sincerely,

Justice Stevens

lfp/ss

cc: The Conference

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

RFP

From: **The Chief Justice**

Circulated: **MAR 30 1982**

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-945

**BRYCE N. HARLOW AND ALEXANDER P.
BUTTERFIELD, PETITIONERS v.
A. ERNEST FITZGERALD**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[April —, 1982]

Memorandum of Dissent, CHIEF JUSTICE BURGER.

The Court today decides in *Nixon v. Fitzgerald*, No. 79-1738, what has been taken for granted for 190 years but not explicitly decided by this Court: it is implicit in the Constitution that a President of the United States has absolute immunity from civil suits arising out of official acts. *Nixon v. Fitzgerald*, ante, at 17. I agree fully that absolute immunity for official acts of the President is, like Executive Privilege, "fundamental to the operation of Government and inextricably rooted in the separation of powers under the constitution." *United States v. Nixon*, 418 U. S. 683, 708 (1974).¹

In this case the Court decides that senior aides of a President do not have the same immunity as the President. I am at a loss, however, to reconcile this conclusion with our holding in *Gravel v. United States*, 408 U. S. 616 (1972). In

¹ Presidential immunity for official acts while in office has never been seriously questioned until the last 10 years. *Nixon v. Fitzgerald*, ante, at 21, n. 36. I can find only one instance in which a citizen sued a former president for acts committed while in office. A suit against Thomas Jefferson was dismissed for being improperly brought in Virginia, thus precluding the necessity of reaching any immunity issue. *Livingston v. Jefferson*, 15 Fed. Cas. 660 (No. 8411) (C.C. VA. 1811).

Reviewed
Relax
almost
exclusively
on Gravel.
Perhaps
we should
consider
some response.
Also
purports
to distinguish
Burger

Gravel we held that it is implicit in the Constitution that aides of Members of Congress have absolute immunity for acts performed for Members in relation to their legislative function. We viewed this immunity as deriving from the Speech or Debate Clause, which provides that "for any Speech or Debate *in either House*, [Senators and Representatives] shall not be questioned in any other place." Art. I, § 6, cl. 1 (emphasis added). Read literally, the Clause would limit absolute immunity to only the Member and to speech and debate only within the Chamber. But we have read much more into this plain language. The Clause says nothing about "legislative acts" outside the Chambers, but we concluded that the Constitution grants absolute immunity for legislative acts not only "in either House" but in committees and conferences and in their reports on legislative activities. Then, far beyond the words to be found in the Constitution itself, we held that a Member's aides who implement policies and decisions of the Member are entitled to the same absolute immunity as a Member. It is hardly an overstatement to say that we thus avoided a "literalist approach", *Gravel, supra*, at 617, and instead looked to the structure of the document and the function of the legislative branch. In short, we drew this immunity for legislative aides from a functional analysis of the legislative process in the context of the document taken as a whole.

In *Gravel* we very properly recognized that the central purpose of a Member's absolute immunity would be "diminished and frustrated" if the legislative aides were not also protected by the same broad immunity. Speaking for the Court, Justice White stated:

"[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; 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*; and that if they are not so recognized, the central role of the Speech and Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary . . .—will inevitably be diminished and frustrated." 408 U. S., at 616-617 (emphasis added).

I joined in that analysis and continue to agree fully with it, for without absolute immunity for the aides, who are indeed "alter egos," a Member could not effectively discharge all of the assigned constitutional functions of a modern legislator.²

Since 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 aides 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"—"alter egos" as we described them in *Gravel*.³ 408 U. S., at 616-617. These words reflect the

² A Senator's allotment for staff varies significantly, but can range from as few as 17 to over 70 persons. S. Doc. No. 19, 97th Cong., 1st Sess., 27-106 (1981). House Members have roughly 18 to 26 assistants at any one time. H.R. Doc. No. 97-113, 97th Cong., 1st Sess., 28-174 (1981).

³ In the early years of the Republic, Members of Congress and Presidents performed their duties without staffs of aides and assistants. Washington and Jefferson spent much of their time on their plantations. Congress did not even appropriate funds for a presidential clerk until 1857, Lincoln opened his own mail, Cleveland answered the phone at the White House and Wilson regularly typed his own speeches. S. Wayne, *The Legislative Process* 30 (1978). Whatever may have been the situation beginning under Washington, Adams and Jefferson, we know today that the presidency functions with a staff that exercises a wide spectrum of authority and discretion and directly assists the President in carrying out Con-

precise analysis of *Gravel*, and this analysis applies with even greater force to a President. The primary layer of senior aides of a President—like a Senator's "alter egos"—are literally at a President's elbow, with offices a few feet or at most a few hundred feet from his own desk. The President, like a Member, may see those aides many times in one day. They maintain regular communication with Cabinet officers and heads of the vast network of the federal bureaucracy to implement directives and policies of the President. They are indeed the President's "arms" and "fingers" to perform his Constitutional duty "to see that the laws are faithfully executed." Like a Member of Congress, but on a vastly greater scale, the President cannot conceivably personally implement a fraction of his own policies and decisions.

Consistent with history and reality, the Court today correctly holds that the Constitution affords a President of the United States absolute immunity from civil liability for official acts. This places the President and Members of the two Houses of Congress on essentially the same basis with respect to civil liability for their official acts, the former under what we hold is implicit in the Constitution, the latter's immunity is express.⁴ The Court in *Gravel* included legislative aides within the constitutional immunity of Members of Congress, not because the Constitution said so explicitly but because it is implicit in the function of the legislative branch under that document.

If, as we held in *Gravel*, "it is literally impossible, in view of the complexities of the modern legislative process . . . for Members of Congress to perform their legislative tasks without the help of aides," is this not at least equally true of a President? 408 U. S., at 616-617. And if the "day-to-day work of such aides is so critical to the Members' performance

stitutional duties.

⁴ It is not insignificant, as a matter of history, that the immunity of a chief of state long preceded recognition of legislative immunity.

that they must be treated as the latter's alter egos," why is this not true of a President's aides? *Ibid.* If we assume each Member of Congress has only 10 aides—and many have more—who are entitled to share in the Member's absolute immunity, that means that more than 5,000 legislative aides are entitled to absolute immunity under the Constitution, as construed by this Court. Yet the Court today holds that the Constitution does not provide equal immunity for two personal "alter ego" aides of a President!

For some inexplicable reason the Court declines to recognize the realities in the workings of the Presidential office, despite the Court's cogent recognition a decade ago in *Gravel* concerning the workings of the Congress. Absent equal protection for a President's aides, how will Presidents be free from the risks of "intimidation . . . by [Congress] and accountability before a possibly hostile judiciary?" 408 U. S., at 617. Under today's holding the functioning of the Presidency will inevitably be "diminished and frustrated." *Id.*, at 616-617.

Precisely the same public policy considerations on which the Court now relies in *Nixon v. Fitzgerald*, and that we relied on only 10 years ago in *Gravel*, are fully applicable to senior presidential aides. The proposed opinion points out that if a President were subject to suit,

"the President *and his advisers* naturally would have an incentive to devote scarce energy, not to performance of their public duties, but to compilation of a record insulating the President from subsequent liability." *Ante*, at 19 (emphasis added).

This same negative "incentive" will permeate the inner workings of the office of the President if that officer's "alter egos," comparable to Congressional aides, are not protected derivatively from the immunity of the President. In addition, exposure to civil liability for official acts will result in constant judicial questioning, through judicial proceedings and pre-

trial discovery, into the inner workings of the Presidential office beyond that necessary to maintain the traditional check and balance of our constitutional structure.⁵

By construing the Constitution to give only qualified immunity to senior presidential aides we give those key "alter egos" nothing more than lawsuits, winnable lawsuits perhaps, but lawsuits nonetheless, with stress and effort that will disperse and drain their energies and their purses. I challenge the Court to say that their effectiveness as presidential aides will not "inevitably be diminished and frustrated," *Gravel, supra*, at 616-617, if they must weigh every act and decision—every discretionary Executive act in which they participate—in relation to future lawsuits. The Court now adds to the other burdens of senior presidential aides—a burden we removed from congressional aides: the stress of long hours, heavy responsibilities, constant exposure to harassment of the political arena, and now the risk of lawsuits while in or on leaving office.⁶

⁵The same remedies for checks on presidential abuse also will check abuses by the comparatively small group of senior aides that act as "alter egos" of the President. The aides serve at the pleasure of the President and thus may be removed by the President. Congressional and public scrutiny maintain a constant and pervasive check on abuses, and such aides may be prosecuted criminally. See *Nixon, ante*, at 23-24. A criminal prosecution cannot be commenced absent careful consideration by a grand jury at the request of a prosecutor; the same check, however, is not present with respect to the commencement of civil suits in which advocates are subject to no realistic accountability.

⁶The Executive Branch may as a matter of grace supply some legal assistance. The Department of Justice has a long-standing policy of representing Federal officers in civil suits for conduct performed within the scope of their employment. In addition, the Department provides for retention of private legal counsel when necessary. See Senate Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, Justice Department Retention of Private Legal Counsel to Represent Federal Employees in Civil Lawsuits, 95th Cong., 2d Sess. (1973). The Congress frequently pays the expenses of defending its members even as to acts wholly outside the legislative function.

In this Court we witness the new filing of 100 cases a week, many utterly frivolous and even bizarre claims. Thousands of other cases are disposed of without reaching this Court. When we see the myriad irresponsible and frivolous cases regularly filed in American courts, the magnitude of the potential risks attending acceptance of public office emerges. Can anyone rationally think such potential risks will not be a factor in discouraging able men and women into public service?

We—judges collectively—have provided absolute immunity for ourselves with respect to judicial acts, however erroneous or ill advised. See, e. g., *Stump v. Sparkman*, 435 U. S. 349 (1978). Are the lowliest of 27,000 judges and 50,000 or more prosecutors in America entitled to greater protection than the senior aides of a President whose absolute immunity derives directly from the Constitution?

Butz v. Economou, 428 U. S. 478 (1978), does not dictate that senior presidential aides be given only qualified immunity. Unlike the present case, *Butz* did not consider the question of constitutionally required immunity for the President. *Butz* rejected a claim that all federal officials exercising discretion were entitled to absolute immunity; we need not abandon that holding. In this case we are not dealing simply with the exercise of discretion in the implementation of congressional acts; rather, we are dealing with the “alter egos” of a President—as *Gravel* dealt with “alter egos” of Senators. Without these aides neither the President nor Members of Congress could conceivably carry out their sworn duties.

By ignoring *Gravel* the Court gravely undermines to a large extent the Presidential immunity today recognized in *Nixon*. This is not an instance in which petitioners request an “undifferentiated extension” of presidential immunity. *Harlow & Butterfield*, *ante*, at 10. The sole question is whether senior “alter ego” aides who work daily with the President in implementing Executive policy directives from

the President are entitled to the same immunity we construed the Constitution to provide for the 5,000 or more aides of the 535 Members of Congress.

There is not the remotest indication in the Constitution that any kind of derivative absolute immunity should be given to Congressional aides yet we recognized that implicit in the presence of express absolute immunity for Members of Congress was a corresponding immunity for the aides who carry out the Members' legislative duties. I find it inexplicable—and indeed it is unexplained—why the Chief Executive of the Nation cannot be assured that his senior staff aides will have the same protection as the aides of Members of the House and Senate and accordingly I dissent.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 1, 1982

Re: No. 80-945 Harlow & Butterfield v. Fitzgerald

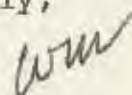
Dear Lewis:

I basically agree with the approach you have taken in this case. I too think that the inquiry of courts in suits against high executive officials should, in those cases where absolute immunity cannot be established, be limited to "objective" good faith. You correctly state that "there often is no clear end to the evidence that may be probative of subjective intent," and that "[j]udicial inquiry into subjective motivation therefore may entail broad-ranging discovery and deposition of numerous individuals." Draft Opinion at 16.

As I understand your opinion, cases will proceed past the summary judgment stage only if the trial court determines (1) that the allegedly violated constitutional rights were well established at the time of the official's action, and (2) that the particular defendant reasonably could be expected to have known about the existence of those rights. I think this approach will facilitate resolution of cases at the summary judgment stage; but I think such resolution would be even easier if the second part of your test required courts to determine whether a "reasonable person" -- as opposed to this particular defendant -- would have known of the existence of the asserted constitutional rights. Perhaps there is not much difference between what a "reasonable person" should have known and what this defendant "reasonably should have known." But by placing the focus on this defendant, I fear that courts will permit "broad-ranging discovery and deposition[s]" in an effort to determine what past exposure this defendant has had to constitutional law. With such a focus, courts may also be slow to grant summary judgment if there is some question as to the extent of the defendant's familiarity with legal matters.

I think that such a possibility could be foreclosed by two minor changes in your opinion. First, the third full sentence on page 18 could be changed to read: "Consistently with the balance at which we aimed in Butz, we therefore hold that at least high executive officials are shielded from liability for civil damages insofar as their conduct does not violate 'settled, indisputable' legal rights of which a reasonable person would have known." Second, the third full sentence on page 19 could be amended to read: "On summary judgment, the judge appropriately may determine what the law was at the time the action occurred and what a reasonable person could have been expected to know about it."

Sincerely,

A handwritten signature in dark ink, appearing to be 'JP' or 'J.P.', written in a cursive style.

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 1, 1982

No. 80-945 Harlow v. Fitzgerald

Dear Lewis,

You have accomplished a difficult task in drafting opinions in this and the Nixon case. They are both well thought out and I am in general agreement with your treatment of this case. I am prepared to support the adoption of an "objective" good faith standard for qualified immunity.

I would not go so far, however, as to immunize illegal actions undertaken in ignorance of "basic, unquestioned" or "settled, indisputable" constitutional rights. "High executive officials" should be charged with knowledge of such rights and should be encouraged to seek the advice of the counsel available to senior officers whenever doubts arise. An ordinary citizen running even a small business must conform to myriad statutes and regulations and acts at his own peril when he acts in ignorance, whether the law is settled or not. We should, I think, expect no less from our officials, at least as regards well-established rights. Moreover, demanding something less invites much litigation over how much law a given official should have been aware of.

For these reasons, I am troubled by the following language on page 19 of your draft: "Charged with decisionmaking under pressures of time and limits of information, not every official fairly could be held responsible for areas of the law remote from his experience or duties. Nor is it reasonable to expect every such official to be familiar with the most recent judicial developments." Would you consider eliminating these sentences from the draft?

Sincerely,

Justice Powell

Sandra

✓
Wood v
Fitzgerald
420 U.S.
at 220

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 5, 1982

No. 80-945 Harlow and Butterfield v.
v. Fitzgerald

Dear Lewis,

Your changes are excellent and I am well
satisfied with the draft as revised.

Sincerely,

Sandra

Justice Powell

cc: Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

✓

April 5, 1982

No. 80-945 Harlow v. Fitzgerald

Dear Lewis,

Please join me in your proposed opinion.

Sincerely,

Sandra

Justice Powell

Copies to the Conference

Relies on
P. Wickham -

Barr v. Matteo - 36

pp. 32-36, 38 & stylistic

Subjective
standard - 36, 37

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
✓ Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 9 APR 1981

1982

4th DRAFT (Version I)

SUPREME COURT OF THE UNITED STATES

No. 79-880

Henry Kissinger et al., Petitioners,
v.
Morton Halperin et al.

On Writ of Certiorari to
the United States Court
of Appeals for the Dis-
trict of Columbia Cir-
cuit.

[February —, 1981]

Memorandum of JUSTICE WHITE.

I approach this case a good deal differently than do Lewis and those who agree with most or all of his submission.

This memorandum first reviews the posture of this case as it comes to us. It then deals with the wiretap statute, concluding that while Title III does not disturb the President's constitutional authority, whatever that may be, to wiretap without a warrant in national security situations, it does declare illegal and provide a remedy for any warrantless interceptions for which the Constitution requires a magistrate's prior approval, as well as for any unreasonable wiretaps whether or not the Constitution requires a warrant. Hence, Title III affords a remedy at least as broad as that afforded by an implied *Bivens* cause of action for a Fourth Amendment violation. Therefore, the latter cause of action need not be pursued in this case. This seems to me by far the most sensible reading of Title III and its legislative history.

It is then submitted that because this is primarily a Title III case, there is no necessity or occasion to address the President's immunity from damages in a *Bivens* case. The immunity question, if there is one before us, is whether the President and his aides are immune from Title III liability.

The petitioners concede they did not bring that issue here, although they do not by any means concede that the President would not be immune from congressionally created remedies such as those contained in Title III. We could properly postpone addressing this issue, as Lewis seems to do, but because absolute immunity is meant in part to relieve a defendant of the burden of litigation in cases such as this one, it would not be improper to decide the question *sua sponte*. At least, I take this course in this memorandum, concluding that Congress may not only establish the ground rules for Presidential wiretapping in national security cases, a matter which does not appear to be in dispute, but may also impose remedies for the violation of those rules.

Finally, I offer a few comments on Lewis' treatment of the immunity of the petitioners from damages liability.¹

I

The respondents claimed damages against petitioners under both Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. § 2510 *et seq.*, and the Fourth Amendment. The District Court dismissed the statutory claim on the ground that "defendants' determination that Title III was inapplicable to the Halperin wiretap was reasonable during the period of surveillance [and there was] no genuine issue of fact in the record controverting this good faith belief on defendants' part." 66A.

¹ I would agree with petitioners that *Keith* should not be applied retroactively and would not oppose saying so, since that is one of the questions presented in the petition and will be involved in the Title III proceedings remanded to the District Court. Also, although the question is not here and there is no need to address it, I would agree with petitioners that on this record the Halperin tap, though warrantless, was reasonable at the outset and that even if the tap at some point became unreasonable and hence violative of the Constitution and of Title III, the President might be exonerated on the ground that he was not responsible for the unreasonable continuation of the tap.

On the constitutional claim, the court held that the warrant requirement was inapplicable during the period of the Halperin tap, which was prior to this Court's decision in *United States v. United States District Court (Keith)*, 407 U. S. 297 (1972), but observed that there could be "no serious contention" that the independent requirement, under the Fourth Amendment, of reasonableness was suspended in the area of national security: "Even if § 2511 (3) and prior presidential practice could be invoked to authorize warrantless wiretaps, national security surveillance still must be 'exercised in a manner compatible with the Fourth Amendment,'" 67A, quoting from *Keith, supra*, at 320. The court did not question that the Executive had been "justifiably" concerned with unauthorized disclosures injurious to the public interest and that wiretapping had been adopted to "investigate and curb leaks." 68A. But without stopping to determine whether there was probable cause to select Halperin as one of the wiretap targets, 68A, the Court determined that in any event the Halperin tap was unreasonable: "Even granting the inapplicability of the general warrant requirement . . . [the Halperin tap was] *per se* unreasonable under the Fourth Amendment and unjustified by any possible exception thereto." 70A. Specifically, the District Court found:

"The evidence here reflects a twenty-one month wiretap continuance without fruits or evidence of wrongdoing, a failure to renew or evaluate the material obtained, and lack of records and procedural compliance, a seemingly political motive for the later surveillance and dissemination of reports, and an apparent effort to conceal the wiretap documents. . . . Regardless of intention, they violated plaintiffs' basic, constitutional right to freedom from unreasonable search and seizure. Like any other citizen, these officials are charged with knowledge of established law and must be held accountable for personal misconduct." 74A.

The District Court further held that none of the defendants could claim absolute immunity "for their excessive improper actions"; nor was the defense of qualified immunity available since petitioners' claim of "subjective good faith" was controverted by "the undisputed record in this case," 73A. After further proceedings, the court determined that only nominal damages should be awarded.

The Court of Appeals set aside the judgment of the District Court and remanded for further proceedings. The Court of Appeals held that Title III was available to respondents as a basis for liability: If, as was alleged, the Halperin tap was not instituted for one of the purposes exempted from Title III by § 2511 (3), the statutory remedies would be available. Title III would also apply to "any period during which the wiretap did not involve the primary purpose of protecting national security information against foreign intelligence activities." 28A. In the Court of Appeals' view, the holding in *Keith* was retroactive and, therefore, the warrant requirement of the Fourth Amendment was applicable to the Halperin tap. Petitioners could, however, escape liability for failing to secure a warrant by proving their defense of qualified immunity. Furthermore, if for any period of time the Halperin tap failed the Fourth Amendment test of reasonableness, petitioners would be liable for the constitutional violation. Finally, the court rejected all claims of absolute immunity, concluding that qualified immunity was ample protection for the conduct involved in this case.

The Court of Appeals remanded the case to the District Court for further proceedings to determine whether and to what extent petitioners were liable under Title III, as well as to determine the exact period of time during which the Halperin tap was unreasonable within the meaning of the Fourth Amendment. On remand, the District Court was also to reconsider the issue of damages.

Petitioners raised three questions in their petition for certiorari: whether the President and his closest advisors are

absolutely immune from personal damages liability for decisions made in the exercise of the President's official authority; whether these federal officers are entitled to qualified immunity as a matter of law for authorizing electronic surveillance for national security purposes prior to this Court's decision in *Keith*; and whether the *Keith* case should be applied retroactively to create personal damages liability for federal officers. Petitioners did not seek review of the Court of Appeals' holding with respect to Title III nor of the remand for further proceedings on the statutory claim. Petitioners do not suggest that Congress is powerless to define the circumstances and the procedures under which electronic surveillance may be employed by the Executive Branch, whether for national security purposes or otherwise. Nor do they ask us to hold that the Court of Appeals erred in concluding that at least for some period of its existence it was "most likely" that the Halperin wiretap violated Title III.

II

Section 2520 of Title III expressly provides that "any person whose wire or oral communication is intercepted . . . in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept . . . such communications. . . ." The section further specifies the damages an aggrieved individual shall be entitled to recover against the person or persons who violate the statute:

"(a) actual damages but not less than liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher;

"(b) punitive damages; and

"(c) a reasonable attorney's fee and other litigation costs reasonably incurred."

Finally, the section provides violators a limited defense to such private damage claims: "A good faith reliance on a court

order or on the provisions of section 2518 (7) of this chapter shall constitute a complete defense."

Petitioners do not claim that they fall within the statutorily provided defense: No court order was ever obtained, and although petitioners could perhaps have made use of the emergency procedures specified in § 2518 (7), this section requires that application for a court order be made within 48 hours after the inception of a warrantless wiretap. No such application was made here.

The sparse legislative history on the civil damages provision of the statute indicates that Congress intended it to be the exclusive federal remedy for wiretaps violating the terms of the statute and that Congress intended the remedy to extend as far as the statute's prohibitions: "The scope of the remedy is intended to be both comprehensive and exclusive, but there is no intent to preempt parallel State law."² The scope of this remedy is limited only by the definition of the term "person" in the statute: "'[P]erson' means any employee, or agent of the United States, . . ." § 2510 (6).³ This definition is surely so broad as to include petitioners, unless they are otherwise exempted from the substantive requirements of the Act.

Section 2511 prohibits, except as otherwise specifically provided in Title III, any person from intercepting or disclosing any wire communication. This broad prohibition on wiretaps that do not conform to the procedures established by the Act is subject to several exceptions. §§ 2511 (2), (3). The only exception relevant to this case is that contained in § 2511 (3), which provides:⁴

"Nothing contained in this chapter . . . shall limit the

² S. Rep. No. 1097, 90th Cong., 2d Sess., p. 107.

³ The Senate Report emphasized that the definition was intended to be "comprehensive" and that it "explicitly includes any officer or employee of the United States," excluding only the governmental units themselves. *Id.*, at 90-91.

⁴ There was some dispute in *United States v. United States District*

constitutional power of the President to take such measures as he deems necessary . . . to protect national security information against foreign intelligence activities. . . . The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power."

JUSTICE POWELL understands this subsection to exempt from Title III any wiretap with a "national security purpose," at least when the wiretap is carried out pursuant to presidential authorization. For JUSTICE POWELL the scope of Title III's application to petitioners depends upon an analysis of their subjective intent: A wiretap that was objectively unreasonable, and thus unconstitutional, may not fall within the prohibitions of Title III if it "retained a national security purpose." *Ante*, at 11. Such a reading of § 2511 (3) is inconsistent with the plain language of Title III, with this Court's previous interpretation of § 2511 (3), and with the legislative history of Title III.

In *United States v. United States District Court*, 407 U. S. 297 (1972), (*Keith*) the Court addressed and rejected the Government's claim that § 2511 (3) recognizes or affirms the power of the President to conduct warrantless searches in pursuit of the national security: "[T]he statute is not the measure of the executive authority asserted in this area." *Id.*, at 308. The Court found that Congress did not intend

Court, 407 U. S. 297 (1972), as to whether § 2511 (3) is more appropriately characterized as an "exemption" or a "disclaimer." The label used is not important; "it is apparent from the face of the section and its legislative history that if this interception is one of those described in § 2511 (3), it is not reached by the statutory ban. . . ." *Id.*, at 338 (WHITE, J., concurring).

"to take anything away from [the President],"⁸ but only to "[leave] presidential powers where it found them." *Id.*, at 303. *Keith* found that Congress had no intent in enacting Title III to limit the President's constitutional powers in certain specific areas; *Keith* did not address, and no reasonable inference can be drawn from that opinion concerning, the reach of the statutory prohibition with respect to actions by the President that do not fall within his "constitutional powers."⁹

⁸ *United States District Court, supra.*, at 307, quoting Senator McClellan, 114 Cong. Rec. 14751.

⁹ JUSTICE POWELL would draw such an inference from *Keith*. He cites the following statement from *Keith* to support his argument that Title III is inapplicable to wiretaps engaged in for a national security purpose, regardless of their constitutionality: "We therefore think the conclusion inescapable that Congress only intended to make clear that the Act simply did not legislate with respect to national security surveillances." (Emphasis added by JUSTICE POWELL.) *Ante*, at 12. In the abstract, this statement appears to support JUSTICE POWELL's position; in the context in which it was written, it does not.

Title III was introduced into the *Keith* case by the Government, not the respondent. The Government's position in that case was that the President had the authority to conduct warrantless wiretaps for national security purposes. In support of this position the Government relied on § 2511 (3), arguing that in it "Congress recognized the President's authority to conduct such surveillance without prior judicial approval." Thus, the discussion of the statute in *Keith* was directed only at this one issue: was § 2511 (3) a "recognition or affirmation of a constitutional authority in the President to conduct warrantless domestic security surveillance"? 407 U. S., at 303.

The Court's analysis of the statute emphasized that contrary to the Government's position the section "confers no power." *Ibid.* It was in this context that the statement that JUSTICE POWELL relies upon was made: It meant only that Congress expressed no view as to any power the President may or may not have in this regard. Having rejected the Government's position that Title III conferred such power upon the President, the Court went on to examine the question of whether the President had such power under the Constitution. The Court concluded that he did not, and that ended the inquiry in *Keith*; as the Court saw

The plain language of the exception indicates that the President is exempted from the requirements of the Act only to the extent that he pursues the specified substantive ends according to the powers given to him by the Constitution.⁷

It *Keith* presented no occasion to go on to the further question of whether the "constitutional warrant requirement for domestic-security surveillances was incorporated into the statutory requirements of Title III." *Ante*, at 13. I do not agree, therefore, that the failure to reach this issue in *Keith* supports an inference that Title III did not incorporate constitutional limits on presidential power.

The analysis of the structure of Title III presented in *Keith*, in fact, supports the position taken in this memorandum. The Court there contrasted the language of § 2511 (8) with that of the four exceptions in § 2511 (2), which state: "It shall not be unlawful under this chapter . . . to intercept" some particular type of communication. This language exempts the type of communication involved from the otherwise blanket prohibition on wiretaps not in conformity with the statute, regardless of the legality of those wiretaps under the Constitution or other laws. As the Court noted in *Keith*, this language is not used in § 2511 (3): "Rather than stating that warrantless presidential uses of electronic surveillance 'shall not be unlawful' and thus employing the standard language of exception, subsection (3) merely disclaims any intention to 'limit the constitutional power of the President.'" *Id.*, at 304. Justice Powell's present reading of subsection (3) ignores this difference.

Nor does Justice Powell accurately read my concurring opinion in *Keith*. *Ante*, at 13. Justice Powell forgets that prior to *Keith* the application of the Fourth Amendment warrant requirement to national security wiretaps was not clear, *Katz v. United States*, 389 U. S. 347, 358, n. 23 (1967). It was my position in *Keith* that the Court need not resolve that issue because the Government agreed that the wiretap was illegal under Title III unless saved by § 2511 (3) and because, as I saw it, even if the warrantless tap was one the President could impose without violating the Constitution, it was nevertheless not within the categories of wiretaps saved by § 2511 (3). Of course, if, as the government argued, § 2511 (3) exempted the tap from the statutory prohibition, then it would have been necessary, as the Court believed it was, to determine whether the tap was constitutionally permissible. There is no inconsistency between my position now and my position in *Keith*.

⁷ "[T]he limitation on the applicability of § 2511 (1) was not open-ended; it was confined to those situations that § 2511 (3) specially de-

The language does not say that the President is exempt from the Act's provisions whenever he takes "such measures as he deems necessary . . ."; rather, it specifies that he may take such measures independently of the requirements of the Act only to the degree that he has the "constitutional power" to do so.² As Senator Holland put it during the Senate's consideration of this exception:

"We are simply saying that nothing herein shall limit such power as the President has under the Constitution. If he does not have the power to do any specific thing, we need not be concerned."

Because the Act specifically addresses the scope of a presidential exemption from Title III, it can properly be inferred that Congress intended presidential acts falling outside of the limits of the language of the exception to be covered by the provisions of the Act.³ If *Keith*, for example, had been de-

scribed. Thus, even assuming the constitutionality of a warrantless surveillance authorized by the President to uncover private or official graft . . . the interception would be illegal under § 2511 (1) because it is not the type of presidential action saved by . . . § 2511 (3)." *United States District Court, supra*, at 338, n. 2 (WHITE, J., concurring).

² Petitioners conceded below and do not contend otherwise here that the President is subject to the reasonableness requirement of the Fourth Amendment.

³ There is one possible contrary indication in the language of the Act. Section 2515 prohibits the use in any proceeding of any materials received in violation of the Act. The fact that § 2511 (3) further restricts the use of information gathered from wiretaps that fall within that exception to instances in which "such interception was reasonable" might be read, therefore, as indicating that the scope of the exception was greater than the President's constitutional authority. That is, the exception might cover all wiretaps authorized by the President, regardless of whether those taps fall within the Fourth Amendment's reasonableness requirement. I believe that the legislative history discussed below indicates that the "reasonableness requirement" was included in § 2511 (3) only because Congress was not certain how broad the President's power was. It intended, therefore, to put clear limits on the use of evidence derived from such taps, regardless of the ultimate decision on the scope of the President's authority.

cided before § 2511 (3) was enacted, there could be no doubt that warrantless wiretapping for domestic security purposes would violate Title III as well as the Fourth Amendment.

The Senate debate over the exception for national security wiretaps sheds light on the scope of the exception for the President in two ways.¹⁰ That debate demonstrated considerable uncertainty in the Senate itself over the reach of the exception. Senator Yarborough objected to the provision on the ground that it "declares that the President has the constitutional power, without any order of the court, to take any measure he deems necessary to protect the Nation against actual or potential attack or danger."¹¹ Senator Long urged rejection of the bill because it gave "unlimited power to authorize tapping in national security cases" to the President. Senator Fong argued that the President does have, as Commander in Chief, power to authorize certain warrantless wiretaps, but that the proposed exception went too far.¹² Responding to this expansive reading of the exception, Senators Hart, McClellan, and Holland engaged in the colloquy reviewed in the *Keith* decision on the meaning of § 2511 (3).¹³ Senator Hart emphasized his fear that the provision would be read as a grant to the President of unlimited authority to tap and Senator McClellan, the sponsor of the bill, and Senator Holland responded that there was no such intent. Rather, the section used neutral language to indicate that the scope of the exception was no broader than the scope of the President's power. As Senator Hart concluded: "[I]f the President has such a power, then its exercise is in no way affected by title."¹⁴

¹⁰ This provision was never discussed on the floor of the House.

¹¹ 114 Cong. Rec. 14730 (1968).

¹² *Id.*, at 14704.

¹³ See *United States District Court, supra*, at 306-307; 114 Cong. Rec. 14750-14751 (1968).

¹⁴ Justice Powell properly reads this statement by Senator Hart to mean that Congress did not intend to "[affect] the assumed power of the

The debate also indicates that there was some uncertainty over the power of Congress to place limits on the President. Senator McClellan was convinced that the Senate had no power to restrict the constitutional powers of the President:

"I do not want to undertake to detract from any power the President already has. I do not think we could do so by legislation anyway. In fact, I know we could not."

From his point of view the purpose of the section was more formal than substantive: Whether it was there or not, the President's constitutional powers remained what they were.

There were, then, two grounds for including § 2511(3): a desire not to restrict whatever constitutional authority the President had in this area and a belief that any attempt

President . . . to wiretap in the national security area." *Ante*, at 13. But to create a statutory remedy for actions that the President concededly has no authority to perform under the Constitution is hardly to affect the power of the President—except in a most indirect manner. JUSTICE POWELL assumes that such a remedy would somehow have such an effect and therefore infers that Congress had no intent to incorporate the constitutional reasonableness requirement into Title III. Senator Hart's statement does not support such an inference: He casts his statement as a conditional statement; the condition he interposes is the limit placed on presidential authority by the Constitution. I do not see how one can read this to imply that if the President does not have such power, then in that case too he is "in no way affected by Title III."

Although Senator Hart in his exchange with Senators McClellan and Holland was particularly concerned with emphasizing that § 2511(3) was not to be interpreted as implying congressional authorization for warrantless wiretaps by the President, he also made clear that he rejected a reading of § 2511(3) that turned on the subjective intent of the President: "But if, in fact, we are here saying that so long as the President thinks it is an activity that constitutes a clear and present danger to the structure or existence of the Government, he can put a bug on without restraint, then clearly I think we are going too far." 114 Cong. Rec. 14751. At least in his view, § 2511(3) was not intended to serve as a shield behind which the President could retreat simply by interposing a claimed national security intent.

to restrict this authority would be unconstitutional. Under either rationale, the scope of the exception for presidentially authorized wiretaps is no broader than the scope of the constitutional power of the President to engage in wiretaps to protect national security information. The reverse side of this, however, is that Congress intended that the statute cover the President insofar as it would be constitutional and insofar as the President did not have constitutional authority in this area. Thus, the civil damages remedy created by the Act is applicable to the President insofar as his actions do not fall within the scope of the exception.

III

No one in this case suggests that Congress is powerless to forbid, impose restrictions on, or establish the procedures for wiretapping in national security cases. Similarly, no one suggests that Congress may not provide remedies for wiretaps that the Constitution forbids. Nor is it urged, as I understand it, that Congress may not forbid or regulate national security wiretaps that the Constitution might otherwise permit to be carried out without a warrant.¹⁵ Indeed, petitioners note that § 2511 (3) has been repealed: "Congress had recently demonstrated [in the 1978 Foreign Intelligence Surveillance Act] its capacity to oversee the actions of the Executive Branch, including Executive action in the areas of national security and foreign affairs." Petitioner's Brief 30, n. 27.

Petitioners conceded below and do not indicate otherwise here that the Fourth Amendment reasonableness requirement applies to the President: The President has no constitutional authority to engage in unreasonable wiretaps. It follows

¹⁵ Specifically, had *Keith* been decided the other way and held that warrantless national security wiretaps in domestic cases are not subject to the warrant requirement of the Fourth Amendment, Congress could nonetheless require a warrant or other conditions for such interceptions.

from the above analysis of Title III that insofar as the wiretap involved in this case was unreasonable under the Fourth Amendment, it was also illegal under Title III. The Crime Control Statute is a complex law but it clearly makes illegal a Presidentially authorized wiretap that complies neither with the procedures of Title III nor with the requirements of the Fourth Amendment. If that is the case, respondents are entitled to the damages remedy specified in the Act—in fact, that is their exclusive federal remedy—unless application of the damages provision of the statute to the President and his aides is unconstitutional.

When Title III is understood in this way, unconstitutional wiretaps are proscribed by the Act and fully adequate remedies are provided by that law. Congress has occupied the field in this regard and there is no occasion in cases such as this to pursue a cause of action directly under the Constitution. The Court of Appeals correctly noted that there could not be double punishment for an unconstitutional wiretap that also violated Title III. 31A, n. 5. Lewis Powell has similarly observed that where Title III and the *Bivens* cause of action overlap, the latter need not be given further consideration. *Ante*, at n. 50. On remand, it is to be determined whether for any period of time the Halperin wiretap required a warrant or was otherwise unreasonable under the Constitution; In either event, the statute would have been violated. The *Bivens* cause of action will, therefore, be beside the point on remand. If a statutory violation is found, the question of whether Congress may constitutionally subject the President and his aides to damages liability for violating an otherwise valid statute will have to be faced.

This raises the question of whether we should now address the question of the President's immunity from Title III damages liability. Petitioners have not brought the Title III issue here. They say they are quite confident they will prevail in the courts below. Perhaps they will, at least with

respect to the President. On this record, it could be held that the Halperin tap was a valid national security interception at the outset; if it became unreasonable at a later time, the President and perhaps others may not be responsible for that development. In that event, the immunity issue, however it might be decided, would not be relevant.

I am nevertheless persuaded that we should deal with the Title III immunity question at this time. A major reason for extending absolute immunity to the performance of certain official functions is to protect the official from the unavoidable distraction that defending serious litigation inevitably entails. In the present posture of this case, the Title III litigation contemplated by the Court of Appeals' remand will go forward in the District Court, and petitioners must defend that litigation. It is true that immunities are usually defenses to be pleaded and proved by the defendants, but considering and passing on a dispositive defense at an early stage of the litigation is within the anticipation of the governing rules, and in an immunity case, there is every reason to do so.

Furthermore, although petitioners have brought here only the question of immunity from damages for having violated the Constitution, they have not abandoned their position that the President is absolutely immune from damages under Title III as well. The immunity argument they present is based on constitutional text and history as well as upon a functional analysis of the Presidency in the light of the separation of powers doctrine. These arguments would also have to be faced in dealing with the question whether Congress may constitutionally create a cause of action for damages against the President. The upshot is that although the question of Title III immunity is not among the questions raised in the petition for certiorari, we have the authority to reach that question, and I would do so.

The immunity question to be dealt with, however, is not

whether these petitioners should have a judicially created immunity to a judicially created cause of action. Rather, it is whether Congress may not only establish rules for national security wiretaps but may also provide a damages remedy against those federal officials, including the President, who breach those rules. This is a considerably different question than the one that Lewis Powell answers. Indeed, he expressly withholds judgment on "whether the statutory damage remedy for illegal wiretapping established by Title III, 18 U. S. C. § 2520 . . . applies to the President, and whether, if so, this remedy is within the power of Congress." *Ante*, at n. 35.

IV

As I see it, only two of the arguments that the Government makes in support of an absolute immunity for the President from civil liability need be addressed: absolute immunity is an "incidental power" of the Presidency, historically recognized as implicit in the Constitution, and absolute immunity is required by the separation of powers doctrine.

A

The Constitution, in the Speech or Debate Clause, Art. I, § 6, guarantees absolute immunity to Members of Congress; nowhere, however, does the Constitution directly address the issue of presidential immunity.¹⁸ Nevertheless, petitioners argue that the debates at the Constitutional Convention and the early history of constitutional interpretation demonstrate an implicit assumption of absolute presidential immunity. In support of this position, petitioners rely primarily on three separate items: first, remarks made during the discussion of

¹⁸ In fact, insofar as the Constitution does address the issue of Presidential liability, it takes a very different approach from that taken in the Speech or Debate Clause. The possibility of impeachment assures that the President can be held accountable to the other branches of Government for his actions and the Constitution further states that impeachment does not bar criminal prosecution.

presidential impeachment at the Convention; second, remarks made during the first Senate; and third, the views of Justice Story.

The debate at the Convention on whether or not the President should be impeachable did touch on the potential dangers of subjecting the President to the control of another branch, the Legislature.¹⁷ Governor Morris, for example, complained of the potential for dependency and argued that "[the President] can do no criminal act without Coadjutors who may be punished. In case he should be re elected, that will be sufficient proof of his innocence."¹⁸ Col. Mason responded to this by asking if "any man [shall] be above Justice" and argued that this was least appropriate for the man "who can commit the most extensive injustice."¹⁹ Madison agreed that "it [is] indispensable that some provision should be made for defending the Community agst the incapacity, negligence or perfidy of the chief Magistrate."²⁰ Pinkney responded on the other side, believing that if granted the power, the Legislature would hold impeachment "as a rod over the Executive and by that means effectually destroy his independence."²¹

Petitioners conclude from this that the delegates meant impeachment to be the exclusive means of holding the President personally responsible for his misdeeds, outside of electoral politics. This conclusion, however, is hardly supported by the debate. Although some of the delegates expressed concern over limiting presidential independence, the delegates voted eight to two in favor of impeachment. Whatever the fear of subjecting the President to the power of another branch, it was not sufficient, or at least not sufficiently shared,

¹⁷ The debate is recorded in 2 M. Farrand, *Records of the Federal Convention of 1787*, 64-69 (1934).

¹⁸ *Id.*, at 64.

¹⁹ *Id.*, at 65.

²⁰ *Ibid.*

²¹ *Id.*, at 66.

to insulate the President from political liability in the impeachment process.

Moreover, the Convention debate did not focus on wrongs the President might commit against individuals, but rather on whether there should be a method of holding him accountable for what might be termed wrongs against the state. Thus, examples of the abuses with which the delegates were concerned were betrayal, oppression, and bribery; the delegates feared that the alternative to an impeachment mechanism would be "tumults and insurrections" by the people in response to such abuses. The only conclusions that can be drawn from this debate are that the independence of the Executive was not understood to require a total lack of accountability to the other branches and there was no general desire to insulate the President from the consequences of his improper acts.

The second piece of historical evidence cited by petitioners is an exchange at the first meeting of the Senate involving Vice-President Adams and Senators Ellsworth and Maclay. The debate started over whether or not the words "the President" should be included at the beginning of Federal writs, similar to the manner in which English writs ran in the King's name. Senator Maclay thought that this would improperly combine the executive and judicial branches. This, in turn, led to a discussion of the proper relation between the two. Senator Ellsworth and Vice-President Adams defended the proposition that

"the President, personally, was not subject to any process whatever; could have no action, whatever, brought against him; was above the power of judges, justices, &c. For [that] would put it in the power of a common justice to exercise any authority over him, and stop the whole machine of government."²²

²² W. Maclay, *Sketches of Debate in the First Senate of the United States in 1789-1791*, 152 (1969).

In their view the impeachment process was the exclusive form of process available against the President. Senator MacClay ardently opposed this view and put the case of a President committing "murder in the street." In his view, in such a case neither impeachment nor resurrection were the exclusive means of holding the President to the law; rather, there was "loyal justice." Senator MacClay, who recorded the exchange, concludes his notes with the remark that none of this "is worth minuting, but it shows clearly how amazingly fond of the old leaven many people are."²³ In his view, Senator Ellsworth and his supporters had not fully comprehended the difference in the political position of the American President and that of the British monarch. Again, nothing more can be concluded from this than that it was no clearer then than now what was the proper scope of presidential accountability and whether the President should be subject to judicial process.

The final item cited by petitioners clearly supports their position, but is of such late date that it contributes little to understanding the original intent. In his Commentaries on the Constitution, published in 1833, Justice Story described the "incidental powers" of the President:

"Among these must necessarily be included the power to perform [his functions] without any obstruction or impediment whatsoever. The President cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability. In the exercise of his political powers he is to use his own discretion, and he is accountable only to his country and to his own conscience. His decision in relation to these powers

²³ *Ibid.*

is subject to no control, and his discretion, when exercised, is conclusive."²⁴

While Justice Story may have been firmly committed to this view in 1833, Senator Pinckney, a delegate to the Convention, was as firmly committed to the opposite view in 1800.²⁵ Senator Pinckney, arguing on the floor of the Senate, contrasted the privileges extended to members of Congress by the Constitution with the lack of any such privileges extended to the President.²⁶ He argued that this was a deliberate choice of the delegates to the Convention, who "well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here." Therefore, "[n]o privilege of this kind was intended for your Executive, nor any except that . . . for your Legislature."²⁷

²⁴ 2 J. Story, *Commentaries on the Constitution* 372 (1873).

²⁵ It is not possible to determine whether this is the same Pinckney that Madison recorded as Pinkney, who objected at the Convention to granting a power of impeachment to the Legislature. Two Charles Pinckneys attended the Convention. Both were from South Carolina. See 3 M. Farrand, *supra*, at 559.

²⁶ Senator Pinckney's comments are recorded at 10 *Annals of Congress* 69-83. Petitioners argue that these remarks are not relevant because they concerned only the authority of Congress to inquire into the origin of an alleged libelous newspaper article. Although this was the occasion for the remarks, Pinckney did discuss the immunity of members of Congress as a privilege embodied in the Speech and Debate Clause: "our Constitution supposes no man . . . to be infallible, but considers them all as mere men, to be subject to all the passions and frailties, and crimes, that men generally are, and accordingly provides for the trial of such as ought to be tried, and leaves the members of the Legislature, for their proceedings, to be amenable to their constituents and to public opinion. . . ." *Id.*, at 71. This, then, was one of the privileges of Congress that he was contrasting with those extended (or not extended) to the President.

²⁷ Nor are Thomas Jefferson's views on the relation of the President to the judicial process quite so clear as Justice Powell suggests. It would be surprising if President Jefferson had not argued strongly for such im-

In previous immunity cases the Court has emphasized the importance of the immunity afforded the particular government official at common law. See *Imbler v. Pachtman*, 424 U. S. 409, 421 (1976). Clearly this sort of analysis is not possible when dealing with an office, the presidency, that did not exist at common law. To the extent that historical inquiry is appropriate in this context, it is constitutional history, not common law, that is relevant. From the history discussed above, however, all that can be concluded is that absolute immunity from civil liability for the President finds no firm support in constitutional text or history, or in the explanations of the early commentators. This is too weak a ground to support a declaration by this Court that Title III is unconstitutional as applied to the President.

munity from judicial process, particularly in a confrontation with Chief Justice Marshall. Jefferson's views on this issue before he became President would be a good deal more significant. Unfortunately he does not appear to have commented on the issue; perhaps because he was out of the country during the Constitutional Convention. It appears, however, that in Jefferson's second and third drafts of the Virginia Constitution, which also proposed a separation of the powers of government into three separate branches, he specifically proposed that the Executive be subject to judicial process: "he shall be liable to action, tho' not to personal restraint for private duties or wrongs." 1 Papers of Thomas Jefferson 350, 360. Also significant is the fact that when Jefferson's followers tried to impeach Justice Chase in 1804-1805, one of the grounds of their attack on him was that he had refused to subpoena President Adams during the trial of Dr. Cooper for sedition. See Corwin, "The President: Office and Powers" 113. Finally, it is worth noting that even in the middle of the debate over Chief Justice Marshall's power to subpoena the President during the Burr trial, Jefferson looked to a legislative solution of the confrontation: "I hope however that . . . at the ensuing session of the legislature [the Chief Justice] may have means provided for giving to individuals the benefit of the testimony of the [Executive] functionaries in proper cases." X Works of Thomas Jefferson, 407 n. (P. Ford Ed. 1905) (quoting a letter from President Jefferson to George Hay, United States District Attorney for Virginia).

B

There is no bright line that can be drawn between constitutionally based separation of powers arguments in favor of absolute immunity and public policy arguments in favor of such immunity. This lack of a bright line necessarily follows from the Court's functional interpretation of the separation of powers doctrine:

"[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Administrator of General Services*, 433 U. S. 425, 433 (1977).

See also *United States v. Nixon*, 418 U. S. 683, 706-707 (1974); *Youngstown Sheet & Tube Co. v. Sawyer*, 379 U. S. 635 (1952) (Jackson, J., concurring). Similarly, petitioners argue that public policy favors absolute immunity because absent such immunity the President's ability to execute his constitutionally mandated obligations will be impaired. The difference, then, is only one of degree. While absolute immunity might maximize executive efficiency and therefore be a worthwhile policy, lack of such immunity may not so disrupt the functioning of the presidency as to violate the separation of powers doctrine. Since liability in this case is of congressional origin, petitioners must demonstrate that subjecting the President to private damages actions for constitutional violations will prevent him from "accomplishing [his] constitutionally assigned functions." I do not believe that petitioners have met this burden.

First, there can be no serious claim that the separation of powers doctrine insulates presidential action from judicial review or insulates the President from judicial process. No claim is made here that the President, whatever his liability for money damages, is not subject to the courts' injunctive

powers.²⁸ See, e. g., *Youngstown Sheet & Tube Co. supra*; *Korematsu v. United States*, 323 U. S. 214 (1944); *Panama Refining Co. v. Ryan*, 293 U. S. 38 (1935). Petitioners, in fact, argue that the possibility of judicial review of presidential actions supports their claim of absolute immunity: Judicial review "serves to contain and correct the unauthorized exercise of the President's power," making private damages actions unnecessary in order to achieve the same end. Petitioners' Brief, at 31. Regardless of the possibility of money damages against the President, then, the constitutionality of the President's actions can and will be reviewed by the courts.

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. *Aaron Burr* case, 25 Fed. Cas. 30 (1807) (Chief Justice Marshall sitting as circuit justice). *Burr* "squarely ruled that a subpoena may be directed to the President." *Nixon v. Sirica*, — U. S. App. D. C. —, 487 F. 2d 700, 709 (1973).²⁹ Chief Justice Mar-

²⁸ Nor have petitioners contended that the President is absolutely immune from criminal prosecution. Obviously the Constitution contemplates criminal liability in providing that impeachment does not exclude the possibility of criminal prosecution.

²⁹ Contrary to the suggestion of JUSTICE POWELL, *ante*, at n. 26, *Mississippi v. Johnson*, 71 U. S. 475 (1866), carefully reserved the question of whether a court may compel the President himself to perform ministerial executive functions:

"We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader issues . . . whether, in any case, the President . . . may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime."

Similarly, *Kendall v. United States*, 12 Pet. 524 (1838), also cited by JUSTICE POWELL, did not indicate that the President could never be sub-

shall flatly rejected any suggestion that all judicial process, in and of itself, constitutes an 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." 25 Fed. Cas., at 34.

This position was recently rearticulated by the Court in *United States v. Nixon*, 418 U. S. 683, 706 (1974):

"Neither the doctrine of separation of powers, nor the need for confidentiality . . . without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances."

These two lines of cases establish then that neither subjecting presidential actions to a judicial determination of their constitutionality, nor subjecting the President to judicial process violates the separation of powers doctrine. With respect to the intrusion of the judicial process itself on Executive functions, subjecting the President to private claims for money damages, however, involves no more than this. If, therefore, there is a separation of powers problem here, it must be found in the nature of the remedy and not in the process involved.

The functional analysis of the separation of powers doc-

ject to judicial process. In fact, it implied just the contrary in rejecting the argument that the mandamus sought involved an unconstitutional judicial infringement upon the Executive Branch:

"The mandamus does not seek to direct or control the postmaster general in the discharge of any official duty, partaking in any respect of an executive character; but to enforce the performance of a mere ministerial act, which neither he nor the president had any authority to deny or control." *Id.* at 410.

trine and the Court's more recent immunity decisions³⁰ converge on the following principle: The scope of immunity is determined by function, not office. The wholesale claim that the President is entitled to absolute immunity in all of his actions stands on no firmer ground than did the claim that all presidential communications are entitled to an absolute privilege, which was rejected in favor of a functional analysis by a unanimous Court in *United States v. Nixon, supra*. Therefore, whatever may be true of the necessity of such a broad immunity in certain areas of executive responsibility,³¹ the only question that must be answered here is whether the use of wiretaps falls within a constitutionally assigned executive function, the performance of which would be significantly impaired by the possibility of a private action for damages resulting from constitutional violations. I believe it does not.

In *Butz v. Economou*, 438 U. S. 478 (1978), we said that "it is not unfair to hold liable the official who knows or should know he is acting outside the law, and . . . insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Id.*, at 506-507. The obvious fairness of this principle has been found by the Court to be outweighed only in instances in which potential liability may have the effect of making one set of alternatives personally more attractive to the decision-maker, without producing a similar social advantage. See *Imbler v. Pachtman*, 424 U. S. 409, 438 (1976) (WHITE, J., concurring). Thus, prosecutors and judges are absolutely immune because claims would only be filed against them for decisions to prosecute and decisions adverse to a party able to bring a civil damages action; society's interest, however,

³⁰ See *Virginia Supreme Court v. Consumers Union of the United States*, No. 79-198, June 2, 1980; *Butz v. Economou*, 438 U. S. 478, 511 (1978).

³¹ I will not speculate on the presidential functions which may require absolute immunity, but a clear example would be instances in which the President participates in prosecutorial decisions.

may be in just those alternatives which would open these officials to a damage claim. No such social/personal tension is present in this situation.

Potential liability would certainly not encourage the use of wiretaps. The use or nonuse of wiretaps, however, is not an area in which society's interest is equally strong in both alternatives. Rather, this is an area that Congress has thought proper to place within strict procedural and substantive limits³² and that some recent Administrations have viewed as posing a substantial danger to the public interest.³³ The Court has also recognized the dangers posed by the nonpublic—i. e., secret—character of executive actions in this area: "The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." *United States District Court, supra*, at 317. "In an area so susceptible to uncorrected constitutional abuse, *id.*, at 314, absolute immunity is inappropriate."³⁴

³² See Title III of the Omnibus Crime Control and Safe Streets Act of 1968, *supra*; Foreign Intelligence Surveillance Act of 1978, Pub. L. 95-511, 92 Stat. 1783.

³³ The Johnson Administration was opposed to Title III of the 1968 Act on the ground that wiretapping was an unnecessary and an unnecessarily dangerous form of intrusion. See 114 Cong. Rec. 11598 (1968), quoting Attorney General Ramsey Clark. The Carter Administration supported the substantive and procedural limits enacted in the Foreign Intelligence Act of 1978, Pub. L. 95-511, 92 Stat. 1783. See Statement of Attorney General Bell before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, Foreign Intelligence Surveillance Act of 1977, 95th Cong., 1st Sess., p. 13 (1977).

³⁴ The lack of a public check on executive wiretapping distinguishes this function from all those in which the Court has previously upheld absolute immunity—judicial, quasi-judicial, and legislative functions. The common feature of all of these, which the Court has heavily relied upon in justifying absolute immunity, is their public character. This public character reduces the need for "private damages actions as a means of controlling unconstitutional conduct." *Buts, supra*, at 513.

The argument that there will not be any interference of constitutional dimensions with executive responsibilities here is particularly strong given that an executive official, including the President, may insulate himself from potential liability by obtaining a judicial warrant. It is difficult to argue that obtaining a warrant is itself an intrusion of constitutional dimensions on executive functions given the manner in which the Fourth Amendment separates and allocates powers in the area of government searches, including wiretaps.⁸⁶

"The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches. . . ."
United States District Court, supra, at 317.

Neither history nor doctrine support petitioners' argument. I conclude, therefore, that neither the judicial process nor the damages liability to which Congress has subjected the President in this Act is unconstitutional.

V

Although I think the Title III immunity issue should be decided, if it is to be put aside and only the immunity of the President and his aides from damages liability for the implied cause of action brought under the Constitution is to be adjudicated, then, as might be inferred from what has gone before, I am in disagreement with JUSTICE POWELL's disposition. In the first place, he deals with the immunity issue in constitutional terms. The strong preference of this Court has been to avoid constitutional questions unnecessary to the disposition of a case. The cause of action that *Bivens* recognized is not expressly provided for in the Constitution;

⁸⁶ See *Berger v. New York*, 388 U. S. 41 (1967); *Katz v. United States*, 389 U. S. 347 (1967).

rather, it was implied by this Court. Because it is a judicially created cause of action, any immunity from such a claim need only be expressed as a judicially recognized immunity, not necessarily required by the Constitution. We did not suggest in *Butz v. Economou*, *supra*, that the immunities recognized for federal officials were required by the Constitution. We simply determined that the cause of action the Court had fashioned in *Bivens* would not reach certain kinds of official conduct. Similarly, it was history, not the Constitution, that dictated the immunities accorded state officials in § 1983 actions. *Pierson v. Ray*, 386 U. S. 547 (1967); *Scheuer v. Rhodes*, 416 U. S. 232 (1974); *Stump v. Sparkman*, 435 U. S. 349 (1978); *Imbler v. Pachtman*, *supra*. Although we were formally engaging in statutory construction in those cases, we have long since recognized that the scope of immunity from § 1983 actions has been largely of "judicial making." See *Barr v. Mateo*, 360 U. S. 564, 569 (1959), quoted in *Butz*, *supra*, at 502. I am, therefore, quite sure that the President could be held absolutely immune in the *Bivens* aspect of this case without rooting the judgment in the Constitution.

We should eschew making constitutional judgments broader than necessary in any particular case. Despite Justice POWELL's disclaimer that he is not deciding the question of whether Congress has the power to apply to the President the statutory damage remedy for illegal wiretapping established by Title III, I do not believe that the argument he presents leaves the question open. As I understand it, Justice POWELL's argument for absolute presidential immunity is basically a separation of powers argument: damages suite would impermissibly interfere with the performance of the President's constitutional functions and would impermissibly interject the judiciary into the sphere reserved for the Executive Branch. These reasons would apply equally to a statutory damage suit against the President. Certainly it is the

Government's view that acceptance of the constitutionally grounded arguments put forth by JUSTICE POWELL would settle the Title III issue as well:

"[I]f, as we submit, the President (and his closest advisers) are entitled to immunity from damages liability for decisions made in the exercise of the President's official responsibilities under Article II of the Constitution, that immunity could serve as a defense to statutory as well as constitutional causes of action." Petitioners' Reply Memorandum, at 1-2.

It is unwise and unsound to make the broad pronouncement that a President is to have absolute immunity for all of his official acts and thus the same protection from damage suits as is accorded to Members of Congress under the Speech or Debate Clause. If we are to reach the question of immunity from an implied cause of action brought under the Constitution, I would limit the holding to the narrow question of whether the President is absolutely immune from damages for violating the Fourth Amendment rights of a citizen through the imposition of a warrantless wiretap. This would be much more consistent with the functional approach the Court took in *Butz* and with the pre-*Butz* absolute immunity decisions. Even under *Barr v. Mateo*, 360 U. S. 584 (1959), and *Spalding v. Vilas*, 161 U. S. 483 (1896), the Court would have to determine whether the warrantless wiretap of the Halperin family phone fell within the "outer perimeter of [the President's] line of duty," 360 U. S., at 575, before it could decide that the President was absolutely immune for his actions in this case.

My problems with JUSTICE POWELL's approach, however, are not limited to the scope of the holding he suggests. I believe that his argument is not consistent with the reasoning of our previous immunity cases. With respect to presidential immunity, his argument makes three errors. First, it improperly extrapolates from *Scheuer v. Rhodes*, *supra*. Sec-

ond, it misapplies the rationale the Court adopted in *Butz*. Third, it draws an unfounded analogy between the immunity appropriate to the President and the immunities afforded officials in the two other branches of the federal government. With respect to the immunity extended to the other petitioners, JUSTICE POWELL develops a subjective standard that has no basis in any of our previous cases.

Evaluation of the appropriate scope of a judicially created presidential immunity should begin, as I believe JUSTICE POWELL begins, with the holding in *Scheuer* that

"[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all of the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." 416 U. S., at 247.

JUSTICE POWELL concludes from this that because the discretion and responsibilities of the President are so much broader than any other official's, so must his immunity be broader—so broad, in fact, as to be absolute.

Scheuer does indeed create a sliding scale in the scope of official immunity. But that scale is implicit in the application of the single standard for executive immunity stated there: "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers. . . ." *Id.*, at 248.

Scheuer contrasted the narrow range of options open to the police officer with the vastly greater range of options open to a governor acting in a civil crisis: The governor must be free to choose from within that broad range on the basis of the information he currently has. Under the standard articulated in *Scheuer*, he is free to choose without incurring liability any of the many options he has, so long as he does so in good faith and has reasonable grounds for his choice.

As the responsibilities of an official become greater so does the range of choices within which he may exercise reasonable discretion. That is, the standard articulated in *Scheuer* itself provides a "greater protection" to higher officials.

At no point did we imply in that decision, or any other, that the fact of a greater range of duties and choices is in itself a reason to protect an official for choices made in bad faith or made without "reasonable grounds." This, however, is precisely the effect of granting the President an "absolute immunity," because he has the broadest responsibilities and therefore the broadest range of options within which to exercise his discretion. JUSTICE POWELL, in short, confuses the increased quantitative protection implicit in the application of the qualified immunity standard to the President, with a qualitatively different kind of protection.

While *Scheuer* articulated the general rule for the scope of executive immunity from damages liability for constitutional violations, *Butz* articulated the basic approach to be taken in deciding whether a particular official's "special functions" require absolute immunity. I agree with JUSTICE POWELL that *Butz* took what can best be described as a "functional" approach. It rejected the Court of Appeals' "undue emphasis" on the location of the official within the executive branch and looked instead to the functions performed by the particular official. In each instance in which absolute immunity was extended to an official, it was extended only to the degree that the officer participated in a function that had previously been found to require absolute immunity for its proper execution. *Butz* stands for the proposition that no official deserves absolute immunity simply by virtue of his rank or position; rather, some officials may perform functions that require absolute immunity and such officials are immune from damages liability for the acts they take in executing those functions.

Thus, under *Butz* there may very well be functions within the President's responsibilities for the performance of which

he is absolutely immune. JUSTICE POWELL acknowledges that Butz suggests such a function by function approach, *ante*, at n. 24, but rejects the suggestion. Instead, he argues that the possibility of damages suits for constitutional violations would hinder the President in the performance of all of his functions:

"The likelihood that Presidents will face large numbers of constitutional damage suits creates a risk that Presidential decisionmaking will be interfered with unduly . . . a sitting President may be diverted from the pressing duties of his office by the requirements of defending numerous lawsuits. . . ." *Ante*, at n. 22.

I have two problems with this reasoning. First, in no instance have we previously held legal accountability in itself to be an unjustifiable cost. The availability of the courts to vindicate constitutional wrongs has been perceived and protected as one of the virtues of our system of delegated and limited powers. As argued in § IV, our concern in fashioning absolute immunity has been that liability may pervert the decisionmaking process in a particular function by undercutting the values we expect to guide those decisions. The caution that comes from requiring reasonable choices in areas that may intrude on individuals' constitutionally protected rights has never before been counted as a cost. Second, JUSTICE POWELL's practical concerns are, at this point, speculative. He admits that "there is no historical record of numerous suits against the President"; nor is there any reason to think that the protection afforded by summary judgment procedures would not be adequate to protect the President, as they currently protect other executive officers from unfounded litigation. Finally, even if judicial procedures are not sufficient, Congress remains free to address this problem if and when it develops.³⁰

³⁰ JUSTICE POWELL also suggests that this case illustrates "a danger of unfairness when officials face personal liability for decisions made in areas

I understand JUSTICE POWELL to have one final argument for absolute immunity: It would somehow be inconsistent with "our constitutional structure" to accord absolute immunity to Members of Congress and Members of this Court, but not to the President. That is, it would not be consistent with the "importance of the role of the chief executive office of the Nation" to afford him a lower level of immunity than that accorded to his counterparts in the other two branches of the Federal Government: "[T]he Founders gave the President, as an individual official, a separate and equal footing with Congress and this Court as corporate bodies." *Ante*, at 19. Analogizing the President to the members of the other branches, however, is wholly out of place. The appropriate analogy under our cases would be between the President and other executive officers, both state and federal, and not between the President and officials who perform functions that have nothing in common with those of the President.

Our decisions with respect to judicial immunity have been founded on an analysis of history and policy. Insofar as particular executive functions share a similar history and/or policy we have not hesitated to recognize absolute immunity for them as well. See *Imbler, supra*; *Butz, supra*. To draw this simple analogy between judges and the President is to avoid the complexity that our previous cases in this area have held to be unavoidable. Similarly, it is to depart from what I took to be well-founded law.

Our decisions did not create the immunity afforded Members of Congress: the Constitution did. Precisely because the Constitution explicitly affords Congressmen—and not the President—immunity from judicial process, analogizing the President to Congressmen is inappropriate. What is more,

of legal uncertainty." *Ante*, at 21. But the qualified immunity standard takes into account "legal uncertainty," so this is not an argument in favor of absolute immunity.

the constitutional history reviewed above, § IV (A), shows it to be unfounded as well. JUSTICE POWELL realizes that there is nothing in the Constitution similar to the Speech or Debate Clause to support his argument. He tries, however, to draw support from this explicit difference in treatment of Members of Congress and the President:

"The omission [from the Constitution] of an explicit exemption of the President from personal damages suits may be explained by a general understanding at the time that no explicit exemption was necessary." *Ante*, at 19.

It may, of course, equally be explained by a quite different intention of the drafters: The most obvious explanation for the different treatment in the written text of the Constitution is that the drafters intended different treatment in fact. It adds a new twist to constitutional interpretation, to say the least, to conclude that the President has absolute immunity under the Constitution because the Framers did not provide for it. In any case, it is difficult to believe there was any "general understanding at the time," when there had never before been an office quite like that of President. Without substantial historical support JUSTICE POWELL's assertion is mere speculation; but the only historical support that JUSTICE POWELL offers is a one-sided account of the lively debate described in § IV (A) above.

JUSTICE POWELL's treatment of the immunity to be afforded petitioners Mitchell, Kissinger, and Haldeman again fails to carry out an analysis of the effect of damages liability on the proper performance of their official functions. The argument of the memorandum is based on one proposition: "if the purpose of immunity is in part to avoid excessive caution on the part of officials who fear personal liability, that purpose must be served where the Nation's security is at stake." *Ante*, at 27. Not only is this far too simple an approach to the complex problem of the appropriate scope

of the immunity to be afforded petitioners, but even if it were adequate, JUSTICE POWELL fails to apply it consistently.

As I argued in § IV (B), absolute, as opposed to qualified, immunity, cannot be justified simply ~~by~~ pointing to a need for forthright governmental action: that rationale is far too broad. Rather, whether absolute immunity is appropriate depends on a careful analysis of the potentially conflicting values implicated in the particular function at issue. *Supra*, at 25-27. But JUSTICE POWELL writes as if society's interests were aligned wholly on the side of encouraging wiretaps here and not equally, if not more, aligned with that of discouraging unreasonable, warrantless searches.

Thus, he notes that Attorney General Mitchell was the "key person" in determining when wiretaps were required to protect national security, and from this observation alone concludes that these "functions were sufficiently unique and important to justify a rule of absolute immunity." *Ante*, at 27. Similarly, the memorandum moves from the observation that Kissinger "had special responsibility and discharged special functions with respect to national security," *ibid.*, to the conclusion that he too should be absolutely immune. Despite the fact that Haldeman was involved with what might have been a national security wiretap, JUSTICE POWELL denies him the absolute immunity afforded the others. JUSTICE POWELL, however, does not distinguish Haldeman from the others on the basis of the principle he purports to be applying—avoiding excessive caution in the national security area. Rather, Haldeman is denied absolute immunity because he functioned only on the basis of an "ad hoc assignment from the President." *Ibid.* Why the perhaps temporary nature of the assignment, rather than the duties performed, is relevant remains a mystery. This kind of argument is clearly the antithesis of the functional analysis that we adopted in *Butz*, and which JUSTICE POWELL purports to be applying.

I also suggest that the absolute immunity that JUSTICE

by

POWELL grants Mitchell and Kissinger is, in fact, absolute in name only: It bears a much closer resemblance to qualified immunity, for petitioners must prove that they acted with a particular subjective intent. A defendant who possesses absolute immunity need only prove that the challenged action fell within the "outer perimeter of [his] line of duty," *Barr v. Mateo*, 360 U. S. 564, 575 (1959), not that the action was performed with a certain intent or under certain conditions. On the other hand, a qualified immunity defense is not available "if [the defendant] 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 the malicious intention to cause a deprivation of constitutional rights or other injury. . . ." (*Wood v. Strickland*, 420 U. S. 308, 322 (1975)). JUSTICE POWELL's proposed standard of "absolute immunity" for Kissinger and Mitchell turns entirely on the nature of the defendant's "subjective intent":

"The effect of this absolute immunity is to limit the possible liability of Mitchell and Kissinger to any period in which they remained responsible for the wiretap and its purpose no longer related to national security concerns." *Ante*, at 32.

We have resisted previous attempts to make qualified immunity turn solely on the subjective intent of the defendant. *Wood, supra*, at 321. Rather, we have insisted that an officer be charged with knowledge of well-established constitutional law and be liable for damages when his conduct violates a standard of objective reasonableness. The subjective element of the qualified immunity standard was not designed to shield those who act with "good intentions"; rather, it was designed to bar an immunity defense to those who acted with "malice": We have held that even if an action is objectively reasonable, a malicious intent to injure or deprive will bar a defense of qualified immunity. See *Wood, supra*, at 322

*Barr v
Mateo*

*Subject
intent*

*solely on
subjective
intent*

??

OMISSION

Wood

(quoted above). I have suggested before, to no avail, that the qualified immunity defense require only objective reasonableness and should not be defeated by a defendant's ill will. As I see it, that would be the better rule. However that may be, there is no basis in any of our immunity cases for a wholly subjective standard, and Lewis' memorandum does not suggest any such basis.

*Subjective
standard*

The subjective test is particularly puzzling in the circumstance of this case. Petitioners have not proposed such a test; in fact, they have argued in favor of just the opposite. In their view, the subjective element of the qualified immunity test imposes too great a burden on high federal officials because it limits the availability of summary judgment. Thus, petitioners argued for a wholly objective test to determine qualified immunity for alleged constitutional violations by high executive officers:

"The same reasons that support the conclusion that these officials are absolutely immune for their official acts . . . also indicate that, if their immunity is only qualified, they should not be required to disprove allegations of 'malice' in personal damages actions . . . charges of malice can be easily made. . . . [T]he conventional doctrine of qualified immunity is entirely inadequate to safeguard the execution of presidential duties. . . ."

Petitioner's Brief, at 61. Judge Gesell, in his concurring opinion below, expressed a similar belief that the subjective element of the qualified immunity test required rethinking in this context:

*Subjective
element*

"It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decision maker's mental process are involved." 52A.

Conditioning immunity on subjective intent will exacerbate the burden of litigation for executive officials. Because

motive is one of the issues least amenable to summary adjudication, this standard will require the trier of fact to examine the defendant's motives in virtually every case. This result is not consistent with a major goal of official immunity in cases like this, which is substantially to remove the threat of litigation from the decisionmaking process of high executive officials in the field of national security.²⁷

²⁷ Justice POWELL appears to present two arguments in support of this subjective test. First, he suggests that a qualified immunity standard would present "a danger in this area that defendants will be unable to mount a successful defense without breaching the secrecy they are sworn to protect." *Ante*, at n. 41. This problem, however, has not arisen in this case and respondents conceded at oral argument that "if a damage claimant runs into a properly claimed state secret privilege assertion, . . . [t]he suit will be dismissed. . . . So those interest will be protected." Tr. of Oral Arg. 38.

Second, he indicates that his proposed standard would ease the litigation burden on the defendant:

"[S]uch a rule would still require [government officials] to litigate the issue of the real purpose of an act, . . . But this rule would still be more protective of petitioners than a rule of qualified immunity, because it would be much easier to establish a defense based on the national security purpose of an action than it would be to establish that one acted in 'good faith' with respect to plaintiffs' constitutional rights." *Ante*, at n. 43.

I doubt the empirical basis for this claim. The aspect of the "good faith" defense that has been most difficult to deal with through summary procedures has been that of subjective purpose—up until now, allegations of malice. But Justice POWELL's proposed standard will require extensive litigation on just such a subjective issue in every case.

lfp/ss 05/19/82

MEMORANDUM

TO: Dick DATE: May 19, 1982
FROM: Lewis F. Powell, Jr.

80-945 Harlow v. Fitzgerald

Byron called me about WJB's letter. I told him that I had not read it and was in the middle of reading tax cases. He nevertheless, in substance, said the following: He referred to the "last paragraph" (I believe) of WJB's letter where - according to BRW - the suggestion is made that we should explicitly leave open some right to discovery on the question of whether the official "knew or should have known" that he was violating the Constitution.

BRW said that he had tried to make clear in Navarette his present view that the law must be "clearly established" (and BRW used this phrase several times) before an official is held liable, and we should say nothing to encourage protracted discovery.

I believe I argued in my Wood v. Strickland dissent that particularly in constitutional law, there are wide areas in which officials of various kinds operate daily where "the law" is not clearly established. As you observed recently, it is one thing to know that the Equal Protection Clause is violated by an ordinance requiring blacks to sit in the rear of a bus. It is something else for a school board member in California or Washington to know today what the law is with respect to busing.

I told BRW that after I had had an opportunity to consider WJB's letter, I would call him back.

I am now right in the middle of John's Asarco case.

L.F.P., Jr.

ss

1fp/ss 05/19/82

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L.F.P., Jr.

BB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

May 19, 1982.

No. 80-945 -- Harlow & Butterfield v. Fitzgerald.

Dear Lewis,

I am still unsettled in this case. Your draft of course effects a substantial change from the standard adhered to in Scheuer v. Rhodes, Wood v. Strickland, and Butz v. Economou, in which we recognized a "good faith" defense that incorporates both objective and subjective elements. But I am inclined to agree with you that "substantial costs attend the litigation of the subjective good faith of high officials of the Executive Branch." Draft at 15-16. At the same time, however, I am troubled by several points in your draft.

(1) You limit the benefit of the new, objective standard to "high executive officials," at least for the time being. Draft at 18. I do not think that I could join in such a limitation, because it appears to be favoring high officials over their subordinates -- an approach of doubtful symbolic value at best. Indeed, I would have thought it arguable that high government officials, since they have greater resources and legal advice available to them, should be held to a higher standard of behavior. All in all, the whole issue of differential treatment according to hierarchical status would be better avoided, in my view. And it seems to me that this is easy to do, since we have already recognized (as you observe in footnote 29) that qualified immunity is of "varying scope ... dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." Scheuer v. Rhodes, 416 U.S., at 247. In sum, if we are to reformulate the good

faith immunity doctrine, should we not announce a rule applicable across the board, subject to the Scheuer limitation noted above?

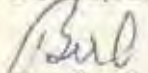
(2) You have defined the new substantive standard of liability to be objective in the sense that an official's "qualified immunity would be defeated if [he] "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff]." Draft at 14 (emphasis yours). You persuade me that, at least with respect to constitutional actions having no ready common-law analogue (e. g., false arrest, imprisonment), a "malicious intention to cause ... injury," ibid. (emphasis yours), is an anomalous basis upon which to rest personal liability: To my mind, the relevant intent inquiry should focus on the official's attentiveness to ascertainable law, on what the official "knew or should have known." Therefore I am willing to accept your view that personal liability should not be imposed upon an official who reasonably believes his conduct to be lawful. And sometimes the law is simply too obscure for us to expect it to be known even to an official who is attentive to the responsibilities of his office. Where the law is thus unsettled, the official ought not to be culpable if he exercises his best judgment.

But while I can travel that far with you, I am troubled by your use of the term, "indisputable legal rights." True, that wording appears in Wood v. Strickland and other opinions. But am I not right that every action may be the subject of some legal dispute? And of course every case may be distinguishable, if only on its facts. Thus even when the law on a point is apparently settled, the question of good faith turns on whether the official has attempted to ascertain that law, and whether his actions were taken in accordance with a colorable view of it. I do not think that we are far apart on this point, but I do fear that "indisputable law" sends out quite the wrong signal. I would feel more comfortable if the references, in outlining the substantive standard, were to refer to "ascertainable law," or simply "the law." Of course, under this standard summary judgment would still be readily available to public-official defendants in two very common

situations: (a) where the state of the law was ambiguous at the time of the alleged violation -- so that the law could not have been "known" then, and thus liability could not ensue -- and (b) where the plaintiff cannot prove, as a threshold matter, that a violation of his constitutional rights actually occurred.

(3) Given the substantive standard that you announce -- imposing liability when the public-official defendant "knew or should have known" of the constitutionally violative effect of his actions -- it seems inescapable to me that some discovery may sometimes be required to determine exactly what the defendant did "know" at the time of his actions. In this respect the issue before us is very similar to that in Herbert v. Lando, 441 U.S. 153 (1979), in which the Court observed that "To erect an impenetrable barrier to the plaintiff's use of such evidence on his side of the case is a matter of some substance, particularly when defendants themselves are prone to assert their good-faith" Id., at 170. I think that the possibility of such discovery needs to be acknowledged, if only in a footnote sentence with a comparing reference to Lando. Of course, it could also be noted at that juncture that summary judgment procedures could be arranged so as to allow public-official defendants an opportunity to gain summary judgment in their favor on grounds such as those outlined in the previous paragraph, before discovery of the defendants' "knowledge" would be permitted. Cf. id., at 180, n. 4 (POWELL, J., concurring).

Sincerely,


W. J. B., Jr.

Justice Powell.
Copies to the Conference.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 21, 1982

Re: 80-945 - Harlow and Butterfield v. Fitzgerald

Dear Lewis,

Under Procunier v. Navarette, 434 U.S. 555, and like cases, a defendant with qualified immunity is not liable for violating a statutory or constitutional right of the plaintiff unless that right was clearly established under the law in existence at the time of the alleged conduct and the defendant knew or should have known of that established right. I would not think this part of the test would be more of a legal than a factual problem: whether the law is clearly established is of that nature, and if the law is clear, it is doubtful that the defendant can absolve himself by claiming that he neither knew nor should have known the established rule applicable to his conduct.

You will also recall that in early circulations in Navarette, I unsuccessfully proposed eliminating the good faith-malicious intention prong of the Scheuer-Strickland formulation of the qualified immunity test. That requirement has never made a great deal of sense to me. At the end of my memorandum last term in the Nixon case I also suggested that the rule be modified and have renewed that suggestion to you earlier this term. Hence, it will come as no surprise to you that I agree with Bill Brennan that the modification, if it is to be made, should not be confined to the President but should be a general rule.

As indicated, if the immunity turns on the state⁽¹⁾ of the law, I would not think the immunity decision would be burdened with factual determinations. Nor would it be if the law is clearly established -- there must be probable cause to arrest, for example -- and the facts are also not in dispute. The question then would be a legal one: was the officer's mistake a reasonable one, as it surely would be in cases where judges divide on whether probable cause exists. Of course, there will be recurring hassles on what the facts are and what the officer knew, but at least the qualified immunity rule, if modified as I hope you will propose, will narrow the possible factual issues a great deal.

Sincerely yours,

Byron

Justice Powell

Copies to the Conference

cpm

May 22, 1982

80-945 Harlow and Butterfield v. Fitzgerald

Dear Byron:

Thank you for your helpful letter of May 21.

As you know from our several conversations, I am in entire agreement as to the desirability of eliminating the good faith-malicious intention component of the Scheuer-Strickland formulation of the qualified immunity test. In the draft I circulated on April 6 in this case, I limited the opinion to senior aides of the President only because the petitioners in this case were in that category.

Since our conversations, I have been in touch with the Justices who joined my draft, and they also are agreeable to the view that our opinion should not be so limited.

I am presently making revisions to accomplish this change, and hope to be recirculating early next week.

I also agree with your identification, in the last paragraph of your letter, of the issues that normally would be decided by a court rather than a jury.

Sincerely,

Justice White

lfp/ss

cc: The Conference

rhf May 25, 1982

Draft letter to WJB concerning Harlow

Dear Bill:

Again I am a bit tardy
Please ~~pardon my delay~~ in responding to your letter of
May 19. I ~~need not inform you how busy these days have~~
been.

In working on the enclosed draft, I have ^{had} held your
suggestions in mind. The opinion ^{now} follows ~~your~~
in accord with your view and Byron's that the
~~suggestion that the proposed~~ good faith immunity standard
should extend "across the board." ~~The draft also is~~
I also removed
~~responsive to your second concern about my reliance on the~~
term "settled, indisputable rights." Although that
formulation did appear in Wood v. Strickland, the current
draft defines the substantive standard in terms of "clearly
established" statutory and constitutional rights. See pages
17-19. *This change is in accord with ~~more~~
the more recent language in Navarette.*

Your third suggestion has proved harder for me to
accommodate, and I have not attempted explicitly to do so in
this draft. But I do share your sense that our views are

(that may be viewed as)
If I hesitate to add language inviting
discovery. We know now from experience
(our admonition in Butz was ineffective) that
the DCs will exercise their own judgment as

to how they apply the Rules in a particular case.

not far apart, especially in light of the changes I have undertaken in the current draft opinion.

If you have further suggestions, I would be happy to consider them.

I hope you will find my changes acceptable.

Sincerely

lfp/ss 05/25/82

80-945 Harlow

I delivered today to JPS a copy of a third draft of this case. For identification purposes this is dated 5/24/82 in pen, and has not been circulated.

The draft contains changes designed to meet Byron's views. I wanted to make sure that John Stevens approved before submitting the draft to Byron. John advised me this afternoon that the changes are entirely agreeable to him. Th next step is to ascertain Byron's views.

L.F.P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

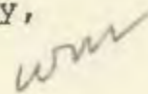
May 26, 1982

Re: No. 80-945 Harlow v. Fitzgerald

Dear Lewis:

I think it is very important to maintain the language about abuse of discovery to which you refer in the third paragraph of your letter to Bill Brennan dated May 26th. After all, you have a Court for that language, and I would see no advantage in weakening it in order to get a couple more votes for the opinion.

Sincerely,



Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

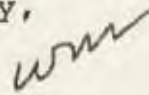
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Sincerely,



Justice Powell

Does WHR have BRW's
proxy in this case? Is WHR
planning to vote twice?

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 26, 1982

No. 80-945 Harlow and Butterfield v. Fitzgerald

Dear Lewis,

As you know, I have previously joined this opinion and I am still with you. I write this only to seek clarification of the last full sentence on page 18. It states that knowledge by an official that his conduct will violate statutory or constitutional rights is sufficient for liability. However, on the preceding pages, and at page 17, I understood the draft to indicate that the subjective element is being discarded and that liability will be imposed only when the official conduct violates clearly established rights of which a reasonable person would have known. Does the sentence on page 18 reintroduce a subjective test?

Sincerely,



Justice Powell

May 26, 1982

80-945 Harlow v. Fitzgerald

Dear Sandra:

Although the last sentence on page 18 was not intended to reintroduce a subjective test, there may be - as you suggest - some ambiguity.

Accordingly, in my next circulation I will make the changes indicated on the enclosed copy of page 18.

I commend your care in weighing every word, a degree of care that we rarely find here during the last few weeks.

Sincerely,

Justice O'Connor

lfp/ss

Dick: I would not recirculate until we give other Chambers a chance to comment on our changes - comments I hope will not be made.

sion to the contrary, we conclude that public policy will not support the cost of conditioning their immunity on proof of subjective intent.

Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law,²¹ should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine what the law was at the time the action occurred and in most cases what a reasonable person could have been expected to know about it.²² Until this threshold immunity question is resolved, extensive discovery generally should not be allowed.

By defining the limits of qualified immunity solely 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 knows that his conduct will violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such knowing conduct may have a cause of action.²³ But where an official's

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tion against federal officials." *Butz v. Economou*, 438 U. S., at 504.

Our decision in no way diminishes the absolute immunity currently available to officials whose functions have been held to require a protection of this scope.

²¹ This case involves no claim that Congress has expressed its intent to impose "no fault" tort liability on high federal officials for violations of particular statutes or the Constitution.

²² As in *Procunier v. Navarette*, 434 U. S. 555, 565 (1978), we need not define here the circumstances under which "the state of the law" should be "evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court."

²³ Cf. *Procunier v. Navarette*, *supra*, 434 U. S., at 565 (footnote omitted) ("Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for established law that their conduct 'cannot reason-

May 26, 1982

80-945 Harlow v. Fitzgerald

Dear Bill:

Again I am a bit tardy in responding to your letter of May 19.

In working on the draft I am circulating this morning, I have had your suggestions in mind. The opinion is now in accord with your view and Byron's that the good faith immunity standard should extend "across the board." I also removed the term "settled, indisputable rights." Although that formulation did appear in Wood v. Strickland, the current draft defines the substantive standard in terms of "clearly established" statutory and constitutional rights. See pages 17-19. This change is in accord with the more recent language in Navarette.

I hesitate to add language that may weaken our renewed admonition against abuse of discovery in these suits against officials. We know from experience that, despite what we said in Butz, District Courts have tended in these cases to allow litigation to go on for years through discovery.

Sincerely,

Justice Brennan

lfp/ss

cc: The Conference

TO: MR. JUSTICE POWELL
FROM: DICK FALLON
RE: SOC's letter in Harlow

It would be very easy to accommodate SOC's suggestion for clarification, in the way indicated on the attached copy of page 18 of Harlow. I suggest that we make the change and recirculate. You then could send a ^{short} ~~brief~~ note, along the lines of:

"In response to your question I have redrafted the last sentence on page 18 to omit any ambiguity. The sentence was not intended to re-introduce a subjective test. I appreciate your well-taken suggestion for clarification."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 26, 1982

No. 80-945 Harlow and Butterfield v. Fitzgerald

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Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

File

May 26, 1982

No. 80-945 Harlow and Butterfield v. Fitzgerald

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Sincerely,

Sandra

Justice Powell

*I showed this to B.R.W
- together with changes on
p 18 that I am making.
He approves.
6/2/82
(See p 18 attached)*

Bryon approved these changes

80-945—OPINION

6/2/82

18

HARLOW & BUTTERFIELD v. FITZGERALD

sion to the contrary, we conclude that public policy will not support the cost of conditioning their immunity on proof of subjective intent.

Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law,¹¹ should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine what the law was at the time the action occurred and in most cases what a reasonable person could have been expected to know about it.¹² Until this threshold immunity question is resolved, extensive discovery generally should not be allowed.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 27, 1982

No. 80-945 Harlow and Butterfield v. Fitzgerald

Dear Lewis,

I continue to join you in this opinion.

Sincerely,

Sandra

Justice Powell

Copies to the Conference

Justice Marshall
Justice Blackmun
✓ Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: 27 May 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS v. A. ERNEST FITZGERALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[May —, 1982]

JUSTICE BRENNAN, concurring.

I agree with the substantive standard announced by the Court today, imposing liability when a public-official defendant "knew or should have known" of the constitutionally violative effect of his actions. *Ante*, at 15, 18. I also agree that this standard applies "across the board," to all "government officials performing discretionary functions." *Id.*, at 17. I write separately only to note that given this standard, it seems inescapable to me that some measure of discovery may sometimes be required to determine exactly what a public-official defendant did "know" at the time of his actions. In this respect the issue before us is very similar to that addressed in *Herbert v. Lando*, 441 U. S. 153 (1979), in which the Court observed that "To erect an impenetrable barrier to the plaintiff's use of such evidence on his side of the case is a matter of some substance, particularly when defendants themselves are prone to assert their good-faith . . ." *Id.*, at 170. Of course, as the Court has already noted, *ante*, at 18, summary judgment will be readily available to public-official defendants whenever the state of the law was so ambiguous at the time of the alleged violation that it could not have been "known" then, and thus liability could not ensue. In my view, summary judgment will also be readily available whenever the plaintiff cannot prove, as a threshold matter,

that a violation of his constitutional rights actually occurred. I see no reason why discovery of defendants' "knowledge" should not be deferred by the trial judge pending decision of any motion of defendants for summary judgment on grounds such as these. *Cf. Herbert v. Lando*, 441 U. S., at 180, n. 4 (POWELL, J., concurring).

MAY 27, 1982

TO: MR. JUSTICE POWELL
FROM: DICK FALLON
RE: Justice Brennan's concurrence in "Harlow"

I don't know what to make of this. WJB ~~was~~ deliberately misreads the opinion as requiring an inquiry--at least in some cases--into what a particular official actually knew. This is "subjective" in the sense of requiring discovery into ~~a~~ particular official's knowledge of the law--possibly a different inquiry from what an official could reasonably have been expected to know. In so reading the opinion, WJB cites page 15--apparently the quotation from Wood concerning the present law, rather than the new standard created by the opinion. The quoted words do not appear on page 18, the other page that he cites. After Justice O'Connor's requested change is made, there will be no ambiguity on page 18.

What to do? WJB has not joined the opinion. According to his clerks, he and several others are awaiting the lead of BRW. I think it probably is best for now to wait for White. Without strong pressure from BRW, I think it may ultimately be important even to point out that WJB is wrong--that the opinion does not contemplate the kind of inquiry to which he refers.

One other point: In the carryover sentence from page 1 to page 2, WJB suggests his support for a stiffening of the burden of proof needed to survive a motion for summary judgment. This was the approach taken in our early drafts, before JPS suggested that the

10
Court lacked power to create an exception of this kind to the Federal Rules of Civil Procedure. It probably is too late to try, but it now appears that there might be a Court for this approach--similar to that of Judge Gesell in Kissinger,--even without JPS. If there were more time, one possibility might be to put this idea informally to WJB, possibly as a compromise for letting him have his way on the "knew or should have known" question.

Again, in view of the time, the best course is probably to await BRW's response to Harlow and simply take as much as he is willing to give. But WJB obviously is "up to something," and I thought I should sketch some of the possibilities that occur to me.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

✓
May 28, 1982.

No. 80-945 -- Harlow and Butterfield
v. Fitzgerald.

Dear Lewis,

In case it was not clear from
my circulation of yesterday, I join in your
draft of May 26 in this case.

Sincerely,

W. J. B.
W. J. B., Jr.

Justice Powell.
Copies to the Conference.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Blackmun

Circulated: MAY 31 1982

Recirculated: _____

No. 80-945 - Harlow v. Fitzgerald

JUSTICE BLACKMUN, concurring.

Having joined the dissent in Nixon v. Fitzgerald, ante, I, like Justice White, disassociate myself from any implication in the Court's opinion in the present case that Nixon v. Fitzgerald was correctly decided. With that reservation, I join the Court's opinion.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 31, 1982

Re: No. 80-945 - Harlow v. Fitzgerald

Dear Bill:

If you will permit me to do so, I would like to have my name added to your separate concurring opinion.

Sincerely,

Harry

Justice Brennan

cc: The Conference

*In her concurring
opinion, I + AB join
my Court opinion.*

*Why didn't he write
me a join note?*

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL



June 2, 1982

Re: No. 80-945 - Harlow and Butterfield v. Fitzgerald

Dear Bill:

Please join me in your concurring opinion.

Sincerely,

J.M.

T.M.

Justice Brennan

cc: The Conference

lfp/ss 06/03/82

BRENH SALLY-POW

80-945 Harlow v. Fitzgerald

Dear Bill:

I must say that your concern over the language change on page 18 surprises me.

The common ground that I thought we all shared was to adopt a wholly objective rather than subjective standard. What one knows can be subjective, and often is. I would agree, however, that ordinarily an official will know what he "could be expected to know". This is certainly true in cases of egregious violation of constitutional rights (e.g., a wiretap purely for political purposes). There will be cases, however, where what an official actually knew could invite extensive discovery. It is for this reason that I viewed the change on page 18 as consistent with our purpose in redefining the standard.

Perhaps the difference in our views could be accommodated by returning to the word "knows" on page 18 as you suggest, and dropping a footnote to the effect that a plaintiff must make some objective showing of knowledge - ie.g., that a bare averment of it would be insufficient to shift the burden.

*Sent to
Byron -
but not
sent to WJB,
as BHW &
developed
an acceptable
alternative.
6/7*

We have been debating these immunity questions for two Terms. In view of the multiplicity of suits brought against officials, and the way in which discovery has been exploited to prolong the litigation even of frivolous claims, I consider it particularly important to have a Court opinion that announces a standard unambiguously. Though not necessary, I think also it would be beneficial if there could be a strong Court rather than a bare margin of five votes. Accordingly, I will await the views of the other Justices.

Sincerely,

Justice Brennan

Harlow File

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 3, 1982.

*See attached drafts - & the
final draft - worked out with*

No. 80-945 -- Harlow & Butterfield v. Fitzgerald.

BRW's

help,

*& approved
by WJB.*

4/7

Dear Lewis,

Most of the changes that you have made in your latest circulation in this case give me no difficulty. The one exception appears on page 18, near the bottom of the page, where one sentence now reads, "Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate" In your previous draft, this sentence began, "Where an official knows that" This change, to my mind, is crucial.

The change manifestly alters the substantive standard to which I agreed in my concurrence. Relying upon the sentence that you have now changed, I understood your previous draft to contain a standard "imposing liability when a public-official defendant 'knew or should have known' of the constitutionally violative effect of his actions." See Harlow v. Fitzgerald, at 1 (BRENNAN, J., concurring). My understanding is, I believe, shared by others in the Harlow majority. See Nixon v. Fitzgerald, at 19 (WHITE, J., dissenting): "Today's decision in Harlow ... makes clear that the President, were he subject to civil liability, could be held liable only for an action that he knew, or as an objective matter should have known, was illegal and a clear abuse of his authority and power." (Emphasis added.)

Moreover, this change in the substantive standard contained in Harlow is important in the resolution of future cases. As you have changed it, the standard would allow the official who actually knew he was violating the law to escape liability for his actions, so long as he could not "reasonably have been expected" to

know what he actually did know. Thus the clever and unusually well-informed violator of constitutional rights would evade just punishment for his crimes. Such a result would be very wrong, to my mind. This is particularly so given that the substantive standard announced in Harlow applies "across the board" to all public-offical defendants.

Accordingly, I suggest that you revise the sentence on page 18 to read, "Where an official knows or could be expected to know" Could you see your way clear to make this revision?

Sincerely,

Bill
W. J. B., Jr.

Justice Powell.
Copies to the Conference.

June 5, 1982

DRAFT

[—] On summary judgment, the judge appropriately may determine what the law was at the time an action occurred. If the law at that time was not clearly established, summary judgment should be entered for the official, since he could not know nor should he have known about a [non-existent] legal standard. ^{not clearly established,} Until this threshold immunity question is resolved, [extensive] discovery should not be allowed. If the law was clearly established, however, the immunity defense should ordinarily fail since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

The above, I suggest, should take the place of the last two sentences of the first full paragraph on p. 18.

Bryon delivered this
to me Sat. AM (6/5)
and I ~~made~~ made some
changes on 6/7. As changed
the draft was approved by
WGB.

BRW's suggested
change on p 18 ✓
Harlow

Extra Copies

June 5, 1982

DRAFT

{— On summary judgment, the judge appropriately may determine what the law was at the time an action occurred. If the law at that time was not clearly established, summary judgment should be entered for the official, since he could not know nor should he have known about a non-existent legal standard. Until this threshold immunity question is resolved, [extensive] discovery should not be allowed. If the law was clearly established, however, the immunity defense should ordinarily fail since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

| The above, I suggest, should take the place of the last two sentences of the first full paragraph on p. 18.

See changes made
on 6/7

LFD

lfp/ss 06/07/82

DRAFT

*As approved
by BRW & WJB*

On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was "clearly established" at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, however, the immunity defense ordinarily should fail since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have know of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

1fp/ss 06/07/82

Ex Lm

DRAFT

On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was "clearly established" at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, however, the immunity defense ordinarily should fail since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have know of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

rhf June 6, 1982

DRAFT

*This is fine
with me but
I don't think
I can "sell" it*

On summary judgment the judge appropriately may determine, not only the currently applicable legal standard, but whether that standard was "clearly established" at the time an action occurred. If the standard at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Summary judgment accordingly should be entered. Until this threshold immunity question is resolved, discovery should not be allowed. Where the applicable law is clearly established, the immunity defense ordinarily should fail: A reasonable official generally should know the law governing his official conduct. We do not foreclose the possibility that an official pleading qualified immunity might prove the existence of extraordinary circumstances, under which he neither knew nor should have known of the relevant legal standard. If so, the immunity defense should be sustained. But again, the immunity defense would depend primarily on objective factors.

File

June 6, 1982

TO: MR. JUSTICE POWELL
FROM: DICK FALLON
RE: Harlow

Generally I have no difficulty with BRW's suggested "compromise" language. I have attached a slightly redrafted version. Most of the changes are stylistic. Two are more nearly substantive. First, in accord with your marked copy of BRW's draft, I have emphasized that it is a decision for the judge whether the law is "clearly established." Second, I have added language asserting that unless the law is "clearly established," an official could not "fairly be said to 'know' that the law forbade [his] conduct." This actually tracks some language in WJB's concurring opinion, but is intended more to defuse it. WJB wants to make sure that officials can be held liable whenever they personally know that their conduct is unlawful, even if they could not be "expected" to know this. By defining "know" in terms of "clearly established" law, the added language would protect officials against a claim that they should have anticipated the declaration of new constitutional rights. This I think is the aspect of the opinion that does most to move the law

in your preferred direction. At the same time, this draft--like BRW's--leaves open the possibility that an official's actual personal knowledge would "count" at least in some few cases where the law was clearly established.

As you will see, both of my suggested "substantive" changes occur in the first two sentences of BRW's draft. If you agree with my suggestions, but think it might be better not to depart too far from BRW's draft, you might consider changing the first two sentences only. You then could tell him that except for changes in the first two sentences, you have accepted his language entirely as drafted.

lfp/ss 06/07/82

Full

DRAFT

On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was "clearly established" at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, however, the immunity defense ordinarily should fail since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have know of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

Cheers! { BRW & I presented this
to WJB today (6/7) and
he approved it. Then I
talked to Sandra & she
said she would agree with
whatever BRW, WJB & I approved.

DRAFT

On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was "clearly established" at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, however, the immunity defense ordinarily should fail since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

June 7, 1982

80-945 Harlow

Dear Byron:

Over the weekend I took a closer look at your suggested substitute for the last two sentences of the first full paragraph on p. 18.

Its substance is agreeable to me. I believe it would be somewhat clearer, however, if the first two sentences were revised as I have indicated on my draft of this morning.

I also omitted the word "extensive" prior to discovery in your third sentence. I have made no further changes.

I agree that it would be a good idea to talk to Bill Brennan, and will join you whenever this is convenient for you and him - preferably some time prior to lunch.

I am grateful to you for your help. At this season of the year, one's own problems more than suffice to overwhelm. At least mine do!

Sincerely,

Justice White

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 7, 1982

No. 80-945 Harlow and Butterfield v.
Fitzgerald

Dear Lewis,

I have no objection to the proposed change
in Nixon. It is still primarily an objective test.

Sincerely,

Sandra

Justice Powell

*I announced
our decision*

the Nixon case

This is a companion case to that just announced.

It involves the same facts, except that petitioners were high White House aides. ^{Again,} The question is what immunity may be claimed by these officials.

The District Court held that they are entitled only to qualified immunity - sometimes referred to as "good faith immunity". The Court of Appeals for the District of Columbia dismissed petitioner's appeal, and we granted certiorari.

In Butz v. Economou, ^U involving a damages suit against the Secretary of Agriculture, we held ^{in 1978,} that Cabinet officers normally do not possess absolute immunity. We think that decision ^A is controlling on this issue. While we recognize that presidential aides often perform duties of great importance and sensitivity, we can draw no distinction between them and officials of Cabinet rank.

normally are

We hold, therefore, that petitioners ~~are~~ ^{are} entitled normally to qualified immunity only. We recognize, however, as we did in Butz v. Economou, ^U that a presidential aide may claim absolute immunity on a functional basis: ^{This would be true} ~~that is,~~ when the challenged act is of such a nature that the public interest requires full protection from the threat of suit.

An example might be

An example might be a discretionary act related to national security or foreign affairs. Neither ^{of these} petitioner, ⁵ ~~on the~~ ^{limited} record before us, has satisfied this functional standard.

We do hold, however, that petitioners at least are entitled to qualified immunity. Prior decisions of this Court have indicated that the qualified immunity defense has both "objective" and "subjective" aspects. We take this occasion to reformulate the applicable standard, as experience has demonstrated the inappropriateness of the subjective component.

We hold, therefore, that a government official/- entitled to qualified immunity/- can be held liable in damages/only for the violation of clearly established rights,/of which a reasonable person would have known.

We remand this case to the District Court for application of this standard.

Justices Brennan, White, Marshall and Blackmun have filed a joint statement/concurring in the ^{Court's} opinion. Justice Brennan has filed a concurring opinion/In which Justices Marshall and Blackmun ^{have} joined. The Chief Justice has written a dissent.

June 23, 1982

Memorandum to the Conference

Cases Held for No. 79-1738, Nixon v. Fitzgerald, or
No. 80-945, Harlow v. Fitzgerald

No. 81-469, Bush v. Lucas

In 1975, while working for NASA, the petitioner criticized the management of his branch of the NASA program. An adverse personnel action ensued, and petitioner suffered a demotion. Following an initial denial of administrative relief, petitioner ultimately won reinstatement and back pay from the Civil Service Commission. In the meantime, however, he had instituted this damages action against respondent, his administrative superior. The suit alleged a conspiracy to deprive petitioner of First Amendment rights. The district court summarily dismissed the action, and CA5 affirmed on the ground that Congress had provided an alternative remedy under the Civil Service Act. This Court then vacated and remanded for reconsideration in light of Carlson v. Green, 446 U.S. 14 (1980). 446 U.S. 914. On the remand CA5 reaffirmed the decision to grant summary judgment. This time it found that "the unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a Bivens remedy in the absence of affirmative congressional action." The panel also noted that inferring a Bivens remedy might encourage employees to bypass congressionally created administrative remedies in favor of judicial relief.

The petitioners in No. 80-945, Harlow v. Fitzgerald, also argued that the respondent's capacity as a government employee represented a "special factor" defeating his claim to a Bivens cause of action under the First Amendment. But the Court did not reach that issue in Harlow. Nor would the circulating opinion in No. 80-1074, Velde v. National Black Police Assn., necessarily be dispositive. The four-member majority in that case relies on a cumulation of factors not all present here.

The question raised is an important one. Moreover, the CA5 decision in this case is in conflict with the decision of CA7 in Sonntag v. Dooley, 650 F.2d 904 (1981).

I will vote to GRANT.

No. 81-872, Turner v. Jordan

The question here is whether the Director of the Central Intelligence Agency is absolutely immune from damages liability for dismissing a CIA employee. The employee was dismissed following his public criticism of the Agency's personnel practices. His suit in the District Court alleged a violation of constitutional rights under the First and Fifth Amendments. Ruling on petitioner's claim of absolute immunity, the District Court stated that absolute immunity might be proper where "defense of a constitutional tort action requires the disclosure of classified information." Here, however, the District Court found that "the defendants have acknowledged that this case involves no such issue of secrecy or security." App. 21a. The District Court certified the case for interlocutory appeal under the collateral order doctrine. CADC (Tamm, Robb, Edwards) affirmed without opinion.

Harlow, No. 80-945, holds open the possibility that federal officials might be entitled to absolute immunity in connection with performance of functions "so sensitive as to require a total shield from liability." Slip op., at 12. Under Harlow, petitioner thus could establish entitlement to absolute immunity in this case if he could "demonstrate that he was discharging a protected function when performing the act for which liability is asserted." Ibid. Here, as noted, the District Court has found that the case involves no issue of "secrecy or security." Nonetheless, the Solicitor General argues that the special functions of the CIA director require an absolute immunity applicable to all personnel actions. Nothing in Harlow suggests that the special status of the CIA director might not raise a unique and unsettled question. But this question--which does seem to me to be unique--of course could be mooted by a decision of the question presented in Bush v. Lucas, supra. If government employment generally constitutes a special factor precluding inference of a Bivens action for adverse personnel actions, that rationale would apply a fortiori to suits against the Director of the CIA. Assuming that the Court will vote to grant in Bush v. Lucas, supra, I will vote to Hold this case for No. 81-469.

No. 81-1010, Purtill v. Schweiker

Petitioner is a 53-year-old employee of HHS. When his superiors failed to promote him, he filed suit in federal court, alleging age discrimination. His complaint based one count on a federal statute, the Age Discrimination in Employment Act (ADEA), and one directly on the Constitution. The District Court dismissed the Bivens count--which alone is here--on grounds that it was preempted by the ADEA. See Carlson v. Green, supra. CA3 agreed.

In this Court there are two possible questions presented for decision. The first is the same as that presented in No. 81-469, Bush v. Lucas. That is whether the government's employment relationship with an employee is a "special factor counseling hesitation" in the inference of a Bivens action. The other is whether the ADEA preempts a Bivens action that might otherwise exist. See Carlson v. Green, 446 U.S. 14, 18-19 (1980). There appears to be a split on the second question. See Sonntag v. Dooley, 650 F.2d 904 (CA7 1981) (upholding Bivens claim by a former federal employee asserting age discrimination by her superiors).

The preemption argument in this case, based on the ADEA, appears to be stronger than that made under the general civil service laws in Bush v. Lucas, supra. Yet the Bush issue--whether federal employment is a special factor precluding Bivens actions for employment decisions--is the broader and more important issue. Viewing the "special factor" question as the one the Court should reach first, I would be inclined to Hold this case if Bush is granted.

Alternatively, I could vote to Grant this case and consolidate it for argument with Bush, supra, No. 81-469.

No. 81-1134, Ashcroft v. National Org. for Women, Inc.

The petitioner in this case is the Attorney General of Missouri. In that capacity he joined other state Attorneys General in bringing an antitrust action against respondent for its convention boycott of States that had not ratified the ERA. Following dismissal of that action, respondent sued petitioner under § 1983. Petitioner claimed absolute immunity from suit, asserting that prosecutorial immunity extended to his initiation of a civil action on behalf of the State. Respondent claimed that petitioner's actions in arranging for the filing of the civil action all occurred in an executive capacity. The District Court denied petitioner's immunity claim without opinion, and CA8, in a brief per curiam order, concluded that the order appealed

from was not final within the meaning of 28 U.S.C. § 1291 and thus not appealable.

In No. 79-1738, United States v. Nixon, the Court reaffirms that orders denying absolute immunity are appealable collateral orders under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Respondent argues that there can be no conflict with this or other cases, because the collateral order doctrine is inherently flexible and not mandatory. But CA8 did not put its decision on this basis. It appears to have held as a matter of law that there was no appealable, because not "final," order. Because our Nixon decision is incompatible with that of CA8 in this respect, I am inclined to vote to GV & R in light of No. 79-1738.

No. 81-1580, Sanborn v. Wolfel

The petitioners in this § 1983 suit are parole officers. As a parolee under their supervision, respondent was arrested for intoxication. He subsequently forfeited bond when he failed to appear for a scheduled hearing. Upon receipt of this and other information, petitioners took respondent into custody for parole violations. There was no on-site hearing to determine whether there was probable cause to revoke his parole, as apparently should have been held under our decision in Morrissey v. Brewer, 408 U.S. 471 (1972). After he was released from incarceration 27 days after his arrest, respondent brought suit against petitioners under § 1983, alleging a violation of due process under Morrissey. A jury awarded damages of \$1,000. On appeal, CA6 rejected petitioners' argument that the trial court had erred in imposing on them the burden of proving that they had acted in good faith. And, after reviewing the record, the CA found that the jury reasonably could have found that petitioners did not act in subjective good faith. As evidence of bad faith, the CA appears to have relied on evidence that petitioners arrested respondent not in response to parole violations, but to secure his detention while more serious charges were investigated. Judge Weick dissented. He argued that the petitioners indisputably had acted in accordance with the policies of the Audit Parole Authority of Ohio and approved as lawful by the Attorney General of Ohio. That policy was not to hold on-site hearings where the parolee had jumped bail for an offense committed while on parole. As laymen, petitioners were entitled to rely on the policy adopted by their employer.

The Court opinion in No. 80-945, Harlow v. Fitzgerald, holds that an official is entitled to good faith immunity insofar as his conduct does not violate "clearly established

constitutional or statutory rights of which a reasonable person would have known." Slip op., at 17. Harlow further provides that an official may establish entitlement to good faith immunity where he can prove that he neither knew nor should have known of the relevant legal standard. In light of petitioner's claimed reliance on established Ohio procedures, the immunity inquiry in this case may be in tension with Harlow's reformulated standard.

Unlike Harlow, however, this case arises under § 1983, and thus presents a technically unsettled question: whether the Harlow standard should be applied to cases under that statute. But see Slip. Op., at 17, and n. 30 (suggesting any distinction would be untenable).

I believe that the Harlow standard should be applicable here. I therefore will vote to Grant, Vacate, and Remand in light of No. 80-945, Harlow v. Butterfield. A judgment order in this case might read as follows:

"The petition is Granted. The judgment is vacated and the case remanded for reconsideration in light of No. 80-945, Harlow v. Butterfield. See Butz v. Economou, 438 U.S. 478, 504 (1978) (deeming it "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under the § 1983 and suits brought directly under the Constitution against federal officials").

L.F.P., Jr.

To: The Chief Justice *John C. Cooper*
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: MAR 17 1982

1st PRINTED DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 80-945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS *v.* A. ERNEST FITZGERALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March —, 1982]

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.

I

In this suit for civil damages petitioners Bryce Harlow and Alexander Butterfield are alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the respondent A. Ernest Fitzgerald. Respondent avers that petitioners entered the conspiracy in their capacities as senior White House aides to former President Richard M. Nixon. As the alleged conspiracy is the same as that involved in *Nixon v. Fitzgerald*, *ante*, the facts need not be repeated in detail.

Respondent claims that Harlow joined the conspiracy in his role as the Presidential aide principally responsible for congressional relations.¹ At the conclusion of discovery the

¹ Harlow held this position from the beginning of the Nixon Administration on January 20, 1969 through November 4, 1969. On that date he was designated as Counsellor to the President, a position accorded Cabinet status. He served in that capacity until December 9, 1970, when he returned to private life. Harlow later resumed the duties of Counsellor for the pe-

supporting evidence remained inferential. As evidence of Harlow's conspiratorial activity respondent relies heavily on a series of conversations in which Harlow discussed Fitzgerald's dismissal with Air Force Secretary Robert Seamans.² The other evidence most supportive of Fitzgerald's claims consists in a recorded conversation in which the President later voiced a tentative recollection that Harlow was "all for canning" Fitzgerald.³

Disputing Fitzgerald's contentions, Harlow argues that exhaustive discovery has adduced no direct evidence of his in-

riod from July 1, 1973 through April 14, 1974. Respondent appears to allege that Harlow continued in a conspiracy against him throughout the various changes of official assignment.

²The record reveals that Secretary Seamans called Harlow in May, 1969, to inquire about likely congressional reaction to a draft reorganization plan that would cause Fitzgerald's dismissal. According to Seamans' testimony, "we [the Air Force] didn't ask [Harlow] to pass judgment on the action itself. We just asked him what the impact would be in the relationship with the Congress." App. 153, 164-165 (Deposition of Robert Seamans). Through an aide Harlow responded that "this was a very sensitive item on the Hill and that it would be [his] recommendation that [the Air Force] not proceed to make such a change at that time." *Id.*, at 152. But the Air Force persisted. Seamans spoke to Harlow on at least one subsequent occasion during the spring of 1969. The record also establishes that Secretary Seamans called Harlow on November 4, 1969, shortly after the public announcement of Fitzgerald's impending dismissal, and again in December 1969. See App. 186.

³See App. 284. (Transcript of a Recorded Conversation between Richard Nixon and Ronald Ziegler, February 26, 1973). In a conversation with the President on January 31, 1973, John Ehrlichman also recalled that Harlow had discussed the Fitzgerald case with the President. See App. 218-221. (Transcript of Recorded Conversation between Richard Nixon and John Ehrlichman, January 31, 1973). In the same conversation the President himself asserted that he had spoken to Harlow about the Fitzgerald matter, see *id.*, at 218, but the parties continue to dispute whether Mr. Nixon—at the most relevant moments in the discussion—was confusing Fitzgerald's case with that of another dismissed employee. The President explicitly stated at one point that he previously had been confused. See *id.*, at 220.

vovement in any wrongful activity.¹ Petitioner avers that Secretary Seamans advised him that considerations of efficiency required Fitzgerald's removal by a reduction in force, despite anticipated adverse congressional reaction. Harlow asserts he had no reason to believe that a conspiracy existed. He contends that he took all his actions in good faith.²

Petitioner Butterfield also is alleged to have entered the conspiracy not later than May 1969. Employed as Deputy Assistant to the President and Deputy Chief of Staff to H.R. Haldeman,³ Butterfield circulated a White House memorandum in that month in which he claimed to have learned that Fitzgerald planned to "blow the whistle" on some "shoddy purchasing practices" by exposing these practices to public view.⁴ Fitzgerald characterizes this memorandum as evi-

¹ See Defendants Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment (Memorandum in Support of Summary Judgment), at 7 (Civil No. 74-178, Feb. 12, 1980).

² In support of his version of events Harlow relies particularly on the deposition testimony of Air Force Secretary Seamans, who stated that he regarded abolition of Fitzgerald's position as necessary "to improve the efficiency" of the Financial Management Office of the Air Force and that he never received any White House instruction regarding the Fitzgerald case. App. 159-160. Petitioner also disputes the probative value of Richard Nixon's recorded remark that Harlow had supported Fitzgerald's firing. Harlow emphasizes the tentativeness of the President's statement. To the President's query whether Harlow was "all for canning [Fitzgerald], wasn't he?", White House Press Secretary Ronald Ziegler in fact gave a negative reply: "No, I think Bryce may have been the other way." App. 284. The President did not respond to Ziegler's comment.

³ The record establishes that Butterfield worked from an office immediately adjacent to the oval office. He had almost daily contact with the President until March 1973, when he left the White House to become Administrator of the Federal Aviation Administration.

⁴ App. 274. Butterfield reported that this information had been referred to the Federal Bureau of Investigation. In the memorandum Butterfield reported that he had received the information "by word of several mouths, but allegedly from a senior AFL-CIO official originally Evidently, Fitzgerald attended a recent meeting of the National Democratic

dence that Butterfield had commenced efforts to secure Fitzgerald's retaliatory dismissal. As evidence that Butterfield participated in the conspiracy to conceal his unlawful discharge and prevent his reemployment, Fitzgerald relies heavily on communications between Butterfield and Haldeman in December 1969 and January 1970. After the President had promised at a press conference to inquire into Fitzgerald's dismissal, Haldeman solicited Butterfield's recommendations. In a subsequent memorandum emphasizing the importance of "loyalty," Butterfield counselled against offering Fitzgerald another job in the Administration at that time.⁶

For his part, Butterfield denies that he was involved in any decision concerning Fitzgerald's employment status until Haldeman sought his advice in December 1969—more than a month after Fitzgerald's termination had been scheduled and announced publicly by the Air Force. Butterfield states that he never communicated his views about Fitzgerald to any official of the Defense Department. He argues generally that nearly eight years of discovery has failed to turn up any evidence that he caused injury to Fitzgerald.⁷

Together with their codefendant Richard Nixon, petitioners Harlow and Butterfield moved for summary judgment on February 12, 1980. In denying the motion the District Court upheld the legal sufficiency of Fitzgerald's *Bivens* claim under the First Amendment and his "inferred" statutory causes of action under 5 U. S. C. § 7211 and 18 U. S. C.

Coalition and, while there, revealed his intentions to a labor representative who, fortunately for us, was unsympathetic." *Ibid.*

⁶ App. 99-100, 180-181. This memorandum was not sent to the Defense Department.

⁷ See Memorandum in Support of Summary Judgment, *supra*, at 26. The history of Fitzgerald's litigation is recounted in *Nixon v. Fitzgerald, ante*. Butterfield was named as a defendant in the initial civil action filed by Fitzgerald in 1974. Harlow was named for the first time in respondent's Second Amended Complaint of July 5, 1978.

§ 1505.¹⁰ The court found that genuine issues of disputed fact remained for resolution at trial. It also ruled that petitioners were not entitled to absolute immunity. Pet. for Cert. 1a-3a.

Independently of former President Nixon, petitioners invoked the collateral order doctrine and appealed the denial of their immunity defense to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed the appeal without opinion. Pet. for Cert. 11a-12a. Never having determined the immunity available to the senior aides and advisers of the President of the United States, we granted certiorari. 452 U. S. 957 (1981).¹¹

II

As we reiterated today in *Nixon v. Fitzgerald*, ante, 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

¹⁰The first of these statutes, 5 U. S. C. § 7211 (Supp. III 1979), provides generally that "The right of employees . . . to . . . furnish information to either House of Congress, or to a committee or a Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. Neither expressly creates a private right to sue for damages. Petitioners argue that the District Court erred in finding that a private cause of action could be inferred under either statute, and that "special factors" present in the context of the federal employer-employee relationship preclude the recognition of respondent's *Bivens* action under the First Amendment. The legal sufficiency of respondent's asserted causes of action is not, however, a question that we view as properly presented for our decision in the present posture of this case. See note 35, *infra*.

¹¹As in *Nixon v. Fitzgerald*, ante, our jurisdiction has been challenged on the basis that the District Court's order denying petitioners' claim of absolute immunity was not an appealable final order and that the Court of Appeals' dismissal of petitioners' appeal establishes that this case was never "in" the Court of Appeals within the meaning of 28 U. S. C. § 1254. As the discussion in *Nixon* establishes our jurisdiction in this case as well, we need not consider those challenges in this opinion.

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. To officials whose special functions or constitutional status requires complete protection from suit, we have extended the defense of "absolute immunity." The absolute immunity of legislators, in their legislative functions, see, *e. g.*, *Eastland v. United States Servicemen's Fund*, 421 U. S. 491 (1975), and of judges, in their judicial functions, see, *e. g.*, *Stump v. Sparkman*, 435 U. S. 349 (1978), now is well settled. Our decisions also have extended absolute immunity to certain officials of the Executive branch. These include prosecutors and similar officials, see *Butz v. Economou*, 438 U. S. 478, 508-512 (1978), executive officers engaged in adjudicative functions, *id.*, at 513-517, and the President of the United States, see *Nixon v. Fitzgerald*, *ante*.

For executive officials in general, however, our cases make plain that qualified immunity represents the norm. In *Scheuer v. Rhodes*, 416 U. S. 232 (1974), we acknowledged that high officials require greater protection than those with less complex discretionary responsibilities. Nonetheless, we held that a governor and his aides could receive the requisite protection from qualified or good-faith immunity. *Id.*, at 247-248. In *Butz v. Economou*, *supra*, we extended the approach of *Scheuer* to high federal officials of the Executive branch. Discussing in detail the considerations that also had underlain our decision in *Scheuer*, we explained that the recognition of a qualified immunity defense for high executives reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, 438 U. S., at 504-505, but also "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Id.*, at 506. Without discounting the adverse policy consequences of denying high officials an absolute immunity from private lawsuits alleging constitutional

violations—consequences found sufficient in *Spalding v. Vilas*, 161 U. S. 483 (1896), and *Barr v. Matteo*, 360 U. S. 564 (1959), to warrant extension to such officials of absolute immunity from suits at common law—we emphasized our expectation that insubstantial suits need not proceed to trial:

“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 *Scheur* 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.” 438 U. S., at 507–508 (citations omitted).

Butz continued to acknowledge that the special functions of some officials might require absolute immunity. But the Court held that “federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.” *Id.*, at 506. This we reaffirmed today in *Nixon v. Fitzgerald*, *ante*, at —.

III

A

Petitioners argue that public policy requires a blanket extension of absolute immunity to Presidential aides. In deciding this claim we do not write on an empty page. In *Butz v. Economou*, *supra*, the Secretary of Agriculture—a Cabinet official directly accountable to the President—asserted a defense of absolute official immunity from suit for civil dam-

ages. We rejected his claim. In so doing we did not question the power or the importance of the Secretary's office. Nor did we doubt the importance to the President of loyal and efficient subordinates in executing his duties of office. Yet we found these factors, alone, to be insufficient to justify absolute immunity. "[T]he greater power of [high] officials," we reasoned, "affords a greater potential for a regime of lawless conduct." 438 U. S., at 506. Damages actions against high officials were therefore "an important means of vindicating constitutional guarantees." *Ibid.* Moreover, we found that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Id.*, at 504.

Having decided in *Butz* 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.

B

In disputing the controlling authority of *Butz*, petitioners rely on the principles developed in *Gravel v. United States*, 408 U. S. 606 (1972).¹² In *Gravel* we endorsed the view that

¹² Petitioners also claim support from other cases that have followed *Gravel* in holding that Congressional employees are derivatively entitled to the legislative immunity provided to United States Senators and Representatives under the Speech and Debate Clause. See *Eastland v. United*

"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. . . ." *Id.*, at 616-617. 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. *Id.*, at 621-622.

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 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 itself¹⁶—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. In *Gravel*,

States Servicemen's Fund, 421 U. S. 491 (1975); *Doe v. McMillan*, 412 U. S. 306 (1973).

¹⁶See U. S. Const., Art. 2, §2 ("The President . . . may require the Opinion, in writing, or the principal Officer in each of the executive Departments, upon any Subject relating to the duties of their respective Offices. . . .").

for example, we emphasized that Senators and their aides were absolutely immune only when performing "acts legislative in nature," and not when taking other acts even "in their official capacity." 408 U. S., at 625. See *Hutchinson v. Proxmire*, 443 U. S. 111, 125-133 (1979). Our cases involving judges¹⁴ and prosecutors¹⁵ have followed a similar line. The undifferentiated extension of absolute "derivative" immunity 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.¹⁶

C

Petitioners also assert an entitlement to immunity based on the "special functions" of White House aides. This form of argument is in accord with the analytical approach of our cases. For aides entrusted with discretionary authority in

¹⁴ See, e. g., *Supreme Court of Virginia v. Virginia Consumers Union*, 446 U. S. 719, 731-737 (1980); *Stump v. Sparkman*, *supra*, 438 U. S., at 362.

¹⁵ In *Imbler v. Pachtman*, 424 U. S. 409, 430-431 (1973), this Court reserved the question whether absolute immunity would extend to "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer." Since that time the courts of appeals generally have ruled prosecutors do not enjoy absolute immunity for acts taken in those capacities. See, e. g., *Mancini v. Leater*, 630 F. 2d 990, 992 (CA3 1980); *Forsyth v. Kleindienst*, 599 F. 2d 1203, 1213-1214 (CA3 1979). This Court at least implicitly has drawn the same distinction in extending absolute immunity to executive officials when they are engaged in quasi-prosecutorial functions. See *Butz v. Economou*, *supra*, 438 U. S., at 515-517.

¹⁶ Our decision today in *Nixon v. Fitzgerald*, *ante*, in no way abrogates this general rule. As we explained in that opinion, the recognition of absolute immunity for all of a President's acts in office derives in principal part from factors unique to his constitutional station. Suits against other officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself. See *ante*, at —.

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.¹⁷ But a "special functions" rationale does not warrant a blanket recognition of absolute immunity for all Presidential aides in the performance of all their duties. This conclusion too follows from our decision in *Butz*, which establishes that an executive official's claim to absolute immunity must be justified by reference to the public interest in the special functions of his office, not the mere fact of high station.¹⁸

Butz also identifies the location of the burden of proof. The burden of justifying absolute immunity rests on the official asserting the claim. 438 U. S., at 506. We have not of course had occasion to identify how a Presidential aide might carry this burden. But the general requisites are familiar in our cases. In order to establish entitlement to absolute immunity a Presidential aide first must show that the respon-

¹⁷ Cf. *United States v. Nixon*, 418 U. S. 683, 710-711 (1974) ("[C]ourts have traditionally shown the utmost deference to Presidential responsibilities" for foreign policy and military affairs, and claims of privilege in this area would receive a higher degree of deference than invocations of "a President's generalized interest in confidentiality"); *Katz v. United States*, 389 U. S. 347, 364 (1967) (White, J., concurring) ("We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.") (emphasis added).

¹⁸ *Gravel, supra*, points to a similar conclusion. We fairly may assume that some aides are assigned to act as Presidential "alter egos," *Gravel, supra*, 408 U. S., at 616-617, in the exercise of functions for which absolute immunity is "essential for the conduct of the public business," *Butz, supra*, 438 U. S., at 507. Cf. *Gravel, supra*, 408 U. S., at 620 (derivative immunity extends only to acts within the "central role" of the Speech and Debate Clause in permitting free legislative speech and debate). By analogy to *Gravel*, a derivative claim to Presidential immunity would be strongest in such "central" Presidential domains as foreign policy and national security, in which the President could not discharge his singularly vital mandate without delegating functions nearly as sensitive as his own.

sibilities of his office embraced a function so sensitive as to require a total shield from liability.¹⁸ He then must demonstrate that he was in fact discharging the protected function when he performed the act for which liability is asserted.¹⁹

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." *Butz, supra*, 438 U. S., at 506. 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. We do not, however, foreclose the possibility that petitioners, on remand, could satisfy the standards properly applicable to their claims.

IV

Even if they cannot establish that their official functions require absolute immunity, petitioners assert that public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial. We agree.

A

As we recognized today in *Nixon v. Fitzgerald, ante*, at —, the resolution of immunity questions inherently re-

¹⁸ Here as elsewhere the relevant judicial inquiries would encompass considerations of public policy, the importance of which should be confirmed either by reference to the common law or, more likely, our constitutional heritage and structure. See *Nixon v. Fitzgerald, ante*, at —.

¹⁹ The need for such an inquiry is implicit in *Butz v. Economou, supra*, 438 U. S., at 508–517; see *Imbler v. Pachtman*, 424 U. S. 409, 430–431 (1976). Cases involving immunity under the Speech and Debate Clause have inquired explicitly into whether particular acts and activities qualified for the protection of the Clause. See, e. g., *Hutchinson v. Proxmire, supra*; *Doe v. McMillan*, 412 U. S. 306 (1973); *Gravel v. United States, supra*.

quires "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. *Butz v. Economou*, *supra*, 438 U. S., at 506; see *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 410 (1971) ("For people in *Bivens*' shoes, it is damages or nothing.²¹"). It is this recognition that has required the denial of absolute immunity to most public officers. 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 the society as a whole.²² These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from the acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties. *Gregoire v. Biddle*, 177, F. 2d 579, 581 (CA2 1949), cert. denied, 339 U. S. 949 (1950). See *Nixon v. Fitzgerald*, *ante*, at

In identifying qualified immunity as the best attainable accommodation of competing values, in *Butz*, *supra*, 438 U. S., at 507-508, as in *Scheuer*, *supra*, 416 U. S., at 245-248, we relied on the assumption that this standard would permit "[i]nsubstantial lawsuits [to] be quickly terminated." *Butz*, *supra*, 438 U. S., at 507-508; see *Hanrahan v. Hampton*, 446 U. S. 754, 765 (POWELL, J., concurring in part and dissenting in part).²³ Yet petitioners advance persuasive arguments

²¹ See generally Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup. Ct. Rev. 281, 324-327.

²² The importance of this consideration hardly needs emphasis. This Court has noted the risk imposed upon political officials who must defend their actions and motives before a jury. See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U. S. 391, 405 (1979); *Tenney v. Brandhove*, 341 U. S. 367, 377-378 (1951). As the Court observed in *Ten-*

that the dismissal of insubstantial lawsuits without trial—a factor presupposed in the balance of competing interests struck by our prior cases—requires an adjustment of the “good faith” standard established by our decisions.

B

Qualified or “good faith” immunity is an affirmative defense that must be pleaded by a defendant official. *Gomez v. Toledo*, 446 U. S. 635 (1980).²³ 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.” *Wood v. Strickland*, 420 U. S. 308, 320 (1975). The subjective component refers to “permissible intentions.” *Ibid.* Characteristically the Court has defined these elements by identifying the circumstances in which qualified immunity would *not* be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if 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. . . .” *Id.*, at 321–322 (emphasis added).²⁴

ney, “In times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed.” 341 U. S., at 378. It is for this among other reasons that *Butz*, *supra*, admonished that insubstantial suits should “not proceed to trial, but can be terminated on a properly supported motion for summary judgment.” 438 U. S., at 508.

²³Although *Gomez* presented the question in the context of an action under § 1983, the Court’s analysis indicates that “immunity” must also be pleaded as a defense in actions under the Constitution and laws of the United States. See 446 U. S., at 640. *Gomez* did not decide which party bore the burden of proof on the issue of good faith. *Id.*, at 642 (REHNQUIST, J., concurring).

²⁴In *Wood* the Court explicitly limited its holding to the circumstances in which a school board member, “in the specific context of school discipline,”

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.²⁵ Yet an official's subjective good faith has been considered to be a question of fact, which some courts apparently have regarded as inherently requiring resolution by a jury.²⁶

Viewed in the context of *Butz*'s attempted balancing of competing values, substantial costs attend the litigation of

420 U. S., at 321, would be stripped on claimed immunity in an action under § 1983. Subsequent cases, however, have quoted the *Wood* formulation as a general statement of the qualified immunity standard. See, e. g., *Procunier v. Navarette*, 434 U. S. 555, 562-563, 566 (1978), quoted in *Baker v. McCollan*, 443 U. S. 137, 139 (1979). The two-pronged standard as phrased in *Wood* actually is somewhat redundant in many if not in most cases. If the defendant neither knew nor should have known that his conduct would violate the plaintiff's constitutional rights, it follows that the defendant could not have acted with a malicious intent to cause a deprivation of constitutional rights of which he knew nothing. The subjective standard thus would be meaningful only in a case in which a defendant acted without knowing that his conduct violated the Constitution, but intending to inflict "other [actionable] injury."

²⁵The Rule states that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether summary judgment is proper, a court ordinarily must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party. E. g., *Poller v. Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962).

²⁶E. g., *Landrum v. Moats*, 576 F. 2d 1320, 1329 (CA8 1978) (good faith "is dependent on motivation and conduct . . . as established at trial") (emphasis added); *Duchesne v. Sugarman*, 566 F. 2d 817, 833 (CA2 1977) (question of good faith is "peculiarly within the jury's province"); cf. *Hutchinson v. Proxmire*, 443 U. S. 111, 120 n. 9 (1979) (questioning whether the existence of "actual malice," as an issue of fact, may properly be decided on summary judgment in a suit alleging libel of a public figure).

the subjective good faith of high officials of the Executive Branch. The duties of these officers often require decisions on controversial issues of gravest importance, in an environment in which views inevitably are affected by loyalty, ideology, and emotion. This environment in part explains why questions of intent so rarely can be decided by summary judgment. Yet it also frames a background in which there often is no clear end to the evidence that may be probative of subjective intent. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous officials. Litigation burdens of this kind not only can distract officials from the performance of their duties.²⁷ At least in the case of such high officials as the

²⁷ As Judge Gesell observed in his concurring opinion in *Kissinger v. Halperin*, 606 F. 2d 1192, 1214 (CA DC 1979), *aff'd* by an equally divided vote, 452 U. S. 713 (1981):

"We should not close our eyes to the fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials based on alleged constitutional torts. Each such suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discovery is wide-ranging, time-consuming, and not without considerable cost to the officials involved. It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient [to force a trial] . . . The effect of this development upon the willingness of individuals to serve their country is obvious."

In *Butz* we concluded that absolute immunity is unnecessary to protect the public interest in "encouraging the vigorous exercise of official authority", 438 U. S. at 506, because we believed that qualified immunity would adequately shield officials from liability for good faith mistakes. We assumed that such immunity would prove "workable". There are indica-

President's closest aides, separation-of-powers concerns also require that such inquiries into executive decisionmaking should not be undertaken lightly.²⁶

tions, however, that some District Courts may not have understood our admonition in *Butz* that "insubstantial" suits against high public officials should not be allowed to proceed to trial. 438 U. S., at 438. See *Schuck*, *supra*, 1980 Sup. Ct. Rev., at 324-327. We reiterate this admonition.

In so doing, we continue to recognize that "In situations of abuse, an action against the responsible official can be an important means of vindicating constitutional guarantees." *Butz*, *supra*, 438 U. S., at 506. This concern applies with special force in the case of officials whose "greater power . . . affords a greater potential for lawless conduct." *Ibid.* We only repeat that insubstantial lawsuits undermine the effectiveness of Government as contemplated by our constitutional structure, and that "firm application of the Federal Rules of Civil Procedure" is fully warranted in such cases. *Id.*, at 508. Under those rules a plaintiff retains, of course, access to reasonable discovery to aid in carrying his burden of raising a material issue of fact. And he need not prove the merits of his case on a motion for summary judgment.

²⁶ See *Nixon v. Fitzgerald*, *ante*, at —; *Nixon v. Administrator of General Services Administration*, 433 U. S. 425, 433 (1977); *United States v. Nixon*, 418 U. S. 683, 711-712 (1974). As the Court recognized in *United States v. Nixon* 418 U. S., at 705-706, 708:

"A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."

Many of the policy considerations implicated by Presidential communications would apply with nearly equal force to communications among Presidential aides and other high Executive officials. The separation-of-powers concerns are different in the two cases, being less weighty where the President personally is not involved. As commentators have observed, however, the "separation of powers" is "a 'political doctrine' and not a technical rule of law." Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempt Cases in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1014 (1924) (footnote omitted). Even where the separation-of-powers doctrine imposes no absolute barrier to judicial functions intruding on the functioning of the Executive

As we affirmed in *Nixon v. Fitzgerald*, *ante*, there are situations in which sufficiently compelling justifications exist. In the case of private suits for damages, however, we conclude today that bare allegations of malice should not suffice either to subject high federal officials to the costs of trial or to license broad-reaching discovery. Consistently with the balance at which we aimed in *Butz*, we therefore hold that at least high executive officials are shielded from liability for civil damages insofar as their conduct does not violate "settled, indisputable" legal rights of which they reasonably should have known. *Wood v. Strickland*, *supra*, 420 U. S., at 321.²⁰ Absent a clear congressional decision to the contrary, we conclude that public policy will not support the cost of conditioning their immunity on proof of subjective intent.²¹

Reliance on the objective reasonableness of an official's conduct, as measured by reference to settled, indisputable law,²² should avoid excessive disruption of government and

Branch, the doctrine does require a judicial consideration of the constitutional interests at stake in cases of particular kinds. See *Nixon v. Fitzgerald*, *ante*, at —; *Nixon v. Administrator of General Services Administration*, *supra*, 433 U. S., at 443 (1977); *United States v. Nixon*, *supra*, 418 U. S., at 711-712 (1974).

²⁰ This case involves no issue concerning the elements of the immunity defense for lower level officials, nor does it present any question of the immunity available to state officials sued for constitutional violations under § 1983. We do not purport to resolve questions that might be framed by cases not properly before us. As we recognized in *Scheur v. Rhodes*, *supra*, 416 U. S., at 247, the qualified immunity defenses possessed by different officials should be determined by reference to "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based."

²¹ This case involves no claim that Congress has expressed its intent to impose "no fault" tort liability on high federal officials for violations of particular statutes or the Constitution.

²² As in *Procunier v. Navarette*, 424 U. S. 555, 565 (1978), we need not define here the circumstances under which "the state of the law" should be "evaluated by reference to the opinions of this Court, of the Courts of Ap-

permit the resolution of many insubstantial claims on summary judgment. Charged with decisionmaking under pressures of time and limits of information, not every official fairly could be held responsible for areas of the law remote from his experience or duties. Nor is it reasonable to expect every such official to be familiar with the most recent judicial developments. On summary judgment, the judge appropriately may determine what the law was at the time the action occurred and in most cases may be able to decide what a particular high official reasonably could be expected to have known about it.²²

By defining the limits on a high official's qualified immunity solely in "objective" terms, we provide no license to lawless conduct. The public interest in deterrence of constitutional violations and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts.²³ Where an official knows that his conduct

peals, or of the local District Court."

²²Cf. *Procunier v. Navarette*, *supra*, 424 U. S., at 565 (footnote omitted) ("Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for established law that their conduct 'cannot reasonably be characterized as being in good faith.'")

²³A victim of wrongful behavior by a public official frequently may be able to obtain compensation by means other than a private suit for damages against the individual wrongdoer in a federal court. In this case, for example, Fitzgerald invoked civil service remedies that resulted in a judgment entitling him to reinstatement and backpay. See Civil Service Commission, *Decision on the Appeal of A. Ernest Fitzgerald* (Sept. 18, 1973). Where relief is available from the Government, as under the Civil Service Act, no immunity defense generally will be recognized. Even under the Federal Tort Claims Act, 28 U. S. C. §§ 1346(b) and 2671-2680, which provides certain exemptions from Government liability, including one for "discretionary functions," see *Dalehite v. United States*, 346 U. S. 15 (1953), this Court has held that "the very purpose of [Congress] was to waive the Government's traditional all-encompassing immunity" and that there is "no justification for this Court to read exemptions into the Act beyond those provided by Congress," *Rayonier, Inc. v. United States*, 352 U. S. 315,

will violate constitutional rights, he should be made to hesitate. Where his duties legitimately require action in which established rights are not implicated—even if the action potentially is harmful to someone that the official dislikes—the public interest frequently may be served better by fearless and unhesitating action.³⁴

C

In this case petitioners have asked us to hold that the respondent's pre-trial showings were insufficient to survive their motion for summary judgment. We think it appropriate, however, to remand the case to the District Court, for its reconsideration of this issue in light of this opinion.³⁵ The trial court is more familiar with the record so far developed and also is better situated to make any such further findings as may be necessary.

V

319, 320 (1957).

³⁴ We emphasize that we hold only that a high federal official is shielded against liability for civil damages arising from actions within the scope of his duties and in "objective" good faith. We express no view as to the conditions in which injunctive or declaratory relief might be available.

³⁵ Petitioners also have urged us, prior to the remand, to rule on the legal sufficiency of respondent's "implied" causes of action under 5 U. S. C. § 7211 and 18 U. S. C. § 1505 and his *Bivens* claim under the First Amendment. We do not view either the statutory or the constitutional question as insubstantial. Cf. *Texas Industries, Inc. v. Radcliff Materials*, 451 U. S. 630, 632-639 (1981) (controlling question in implication of statutory causes of action is whether Congress affirmatively intended to create a damages remedy); *Bush v. Lucas*, 647 F. 2d 573, 576 (CA5 1981), affirming on remand 598 F. 2d 958 (CA5 1979) (holding that the "unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a *Bivens* remedy"). As in *Nixon v. Fitzgerald*, *ante*, however, we took jurisdiction of the case only to resolve the immunity question under the collateral order doctrine. We therefore think it appropriate to leave these questions for fuller consideration by the District Court and, if necessary, by the Court of Appeals.

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

So ordered.

- pgs 18, 19

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS, *v.* A. ERNEST FITZGERALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[April —, 1982]

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.

I

In this suit for civil damages petitioners Bryce Harlow and Alexander Butterfield are alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the respondent A. Ernest Fitzgerald. Respondent avers that petitioners entered the conspiracy in their capacities as senior White House aides to former President Richard M. Nixon. As the alleged conspiracy is the same as that involved in *Nixon v. Fitzgerald*, *ante*, the facts need not be repeated in detail.

Respondent claims that Harlow joined the conspiracy in his role as the Presidential aide principally responsible for congressional relations.¹ At the conclusion of discovery the

¹ Harlow held this position from the beginning of the Nixon Administration on January 20, 1969 through November 4, 1969. On that date he was designated as Counsellor to the President, a position accorded Cabinet status. He served in that capacity until December 9, 1970, when he returned to private life. Harlow later resumed the duties of Counsellor for the pe-

supporting evidence remained inferential. As evidence of Harlow's conspiratorial activity respondent relies heavily on a series of conversations in which Harlow discussed Fitzgerald's dismissal with Air Force Secretary Robert Seamans.² The other evidence most supportive of Fitzgerald's claims consists in a recorded conversation in which the President later voiced a tentative recollection that Harlow was "all for canning" Fitzgerald.³

Disputing Fitzgerald's contentions, Harlow argues that exhaustive discovery has adduced no direct evidence of his in-

riod from July 1, 1973 through April 14, 1974. Respondent appears to allege that Harlow continued in a conspiracy against him throughout the various changes of official assignment.

²The record reveals that Secretary Seamans called Harlow in May, 1969, to inquire about likely congressional reaction to a draft reorganization plan that would cause Fitzgerald's dismissal. According to Seamans' testimony, "we [the Air Force] didn't ask [Harlow] to pass judgment on the action itself. We just asked him what the impact would be in the relationship with the Congress." App. 153, 164-165 (Deposition of Robert Seamans). Through an aide Harlow responded that "this was a very sensitive item on the HQ and that it would be [his] recommendation that [the Air Force] not proceed to make such a change at that time." *Id.*, at 152. But the Air Force persisted. Seamans spoke to Harlow on at least one subsequent occasion during the spring of 1969. The record also establishes that Secretary Seamans called Harlow on November 4, 1969, shortly after the public announcement of Fitzgerald's impending dismissal, and again in December 1969. See App. 186.

³See App. 284. (Transcript of a Recorded Conversation between Richard Nixon and Ronald Ziegler, February 26, 1973). In a conversation with the President on January 31, 1973, John Ehrlichman also recalled that Harlow had discussed the Fitzgerald case with the President. See App. 218-221. (Transcript of Recorded Conversation between Richard Nixon and John Ehrlichman, January 31, 1973). In the same conversation the President himself asserted that he had spoken to Harlow about the Fitzgerald matter, see *id.*, at 218, but the parties continue to dispute whether Mr. Nixon—at the most relevant moments in the discussion—was confusing Fitzgerald's case with that of another dismissed employee. The President explicitly stated at one point that he previously had been confused. See *id.*, at 220.

volvement in any wrongful activity.⁴ Petitioner avers that Secretary Seamans advised him that considerations of efficiency required Fitzgerald's removal by a reduction in force, despite anticipated adverse congressional reaction. Harlow asserts he had no reason to believe that a conspiracy existed. He contends that he took all his actions in good faith.⁵

Petitioner Butterfield also is alleged to have entered the conspiracy not later than May 1969. Employed as Deputy Assistant to the President and Deputy Chief of Staff to H.R. Haldeman,⁶ Butterfield circulated a White House memorandum in that month in which he claimed to have learned that Fitzgerald planned to "blow the whistle" on some "shoddy purchasing practices" by exposing these practices to public view.⁷ Fitzgerald characterizes this memorandum as evi-

⁴ See Defendants Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment (Memorandum in Support of Summary Judgment), at 7 (Civil No. 74-173, Feb. 12, 1980).

⁵ In support of his version of events Harlow relies particularly on the deposition testimony of Air Force Secretary Seamans, who stated that he regarded abolition of Fitzgerald's position as necessary "to improve the efficiency" of the Financial Management Office of the Air Force and that he never received any White House instruction regarding the Fitzgerald case. App. 159-160. Petitioner also disputes the probative value of Richard Nixon's recorded remark that Harlow had supported Fitzgerald's firing. Harlow emphasizes the tentativeness of the President's statement. To the President's query whether Harlow was "all for canning [Fitzgerald], wasn't he?", White House Press Secretary Ronald Ziegler in fact gave a negative reply: "No, I think Bryce may have been the other way." App. 284. The President did not respond to Ziegler's comment.

⁶ The record establishes that Butterfield worked from an office immediately adjacent to the oval office. He had almost daily contact with the President until March 1973, when he left the White House to become Administrator of the Federal Aviation Administration.

⁷ App. 274. Butterfield reported that this information had been referred to the Federal Bureau of Investigation. In the memorandum Butterfield reported that he had received the information "by word of several mouths, but allegedly from a senior AFL-CIO official originally Evidently, Fitzgerald attended a recent meeting of the National Democratic

dence that Butterfield had commenced efforts to secure Fitzgerald's retaliatory dismissal. As evidence that Butterfield participated in the conspiracy to conceal his unlawful discharge and prevent his reemployment, Fitzgerald relies heavily on communications between Butterfield and Haldeman in December 1969 and January 1970. After the President had promised at a press conference to inquire into Fitzgerald's dismissal, Haldeman solicited Butterfield's recommendations. In a subsequent memorandum emphasizing the importance of "loyalty," Butterfield counselled against offering Fitzgerald another job in the Administration at that time.¹

For his part, Butterfield denies that he was involved in any decision concerning Fitzgerald's employment status until Haldeman sought his advice in December 1969—more than a month after Fitzgerald's termination had been scheduled and announced publicly by the Air Force. Butterfield states that he never communicated his views about Fitzgerald to any official of the Defense Department. He argues generally that nearly eight years of discovery has failed to turn up any evidence that he caused injury to Fitzgerald.²

Together with their codefendant Richard Nixon, petitioners Harlow and Butterfield moved for summary judgment on February 12, 1980. In denying the motion the District Court upheld the legal sufficiency of Fitzgerald's *Bivens* claim under the First Amendment and his "inferred" statutory causes of action under 5 U. S. C. § 7211 and 18 U. S. C.

Coalition and, while there, revealed his intentions to a labor representative who, fortunately for us, was unsympathetic." *Ibid.*

¹ App. 99-100, 180-181. This memorandum was not sent to the Defense Department.

² See Memorandum in Support of Summary Judgment, *supra*, at 26. The history of Fitzgerald's litigation is recounted in *Nixon v. Fitzgerald*, *ante*. Butterfield was named as a defendant in the initial civil action filed by Fitzgerald in 1974. Harlow was named for the first time in respondent's Second Amended Complaint of July 5, 1978.

§ 1505.¹⁰ The court found that genuine issues of disputed fact remained for resolution at trial. It also ruled that petitioners were not entitled to absolute immunity. Pet. for Cert. 1a-3a.

Independently of former President Nixon, petitioners invoked the collateral order doctrine and appealed the denial of their immunity defense to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed the appeal without opinion. Pet. for Cert. 11a-12a. Never having determined the immunity available to the senior aides and advisers of the President of the United States, we granted certiorari. 452 U. S. 957 (1981).¹¹

II

As we reiterated today in *Nixon v. Fitzgerald*, *ante*, 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

¹⁰The first of these statutes, 5 U. S. C. § 7211 (Supp. III 1979), provides generally that "The right of employees . . . to . . . furnish information to either House of Congress, or to a committee or a Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. Neither expressly creates a private right to sue for damages. Petitioners argue that the District Court erred in finding that a private cause of action could be inferred under either statute, and that "special factors" present in the context of the federal employer-employee relationship preclude the recognition of respondent's *Bivens* action under the First Amendment. The legal sufficiency or respondent's asserted causes of action is not, however, a question that we view as properly presented for our decision in the present posture of this case. See note 35, *infra*.

¹¹As in *Nixon v. Fitzgerald*, *ante*, our jurisdiction has been challenged on the basis that the District Court's order denying petitioners' claim of absolute immunity was not an appealable final order and that the Court of Appeals' dismissal of petitioners' appeal establishes that this case was never "in" the Court of Appeals within the meaning of 28 U. S. C. § 1254. As the discussion in *Nixon* establishes our jurisdiction in this case as well, we need not consider those challenges in this opinion.

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. To officials whose special functions or constitutional status requires complete protection from suit, we have extended the defense of "absolute immunity." The absolute immunity of legislators, in their legislative functions, see, e. g., *Eastland v. United States Servicemen's Fund*, 421 U. S. 491 (1975), and of judges, in their judicial functions, see, e. g., *Stump v. Sparkman*, 435 U. S. 349 (1978), now is well settled. Our decisions also have extended absolute immunity to certain officials of the Executive branch. These include prosecutors and similar officials, see *Butz v. Economou*, 438 U. S. 478, 508-512 (1978), executive officers engaged in adjudicative functions, *id.*, at 513-517, and the President of the United States, see *Nixon v. Fitzgerald*, *ante*.

For executive officials in general, however, our cases make plain that qualified immunity represents the norm. In *Scheuer v. Rhodes*, 416 U. S. 232 (1974), we acknowledged that high officials require greater protection than those with less complex discretionary responsibilities. Nonetheless, we held that a governor and his aides could receive the requisite protection from qualified or good-faith immunity. *Id.*, at 247-248. In *Butz v. Economou*, *supra*, we extended the approach of *Scheuer* to high federal officials of the Executive branch. Discussing in detail the considerations that also had underlain our decision in *Scheuer*, we explained that the recognition of a qualified immunity defense for high executives reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, 438 U. S., at 504-505, but also "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Id.*, at 506. Without discounting the adverse policy consequences of denying high officials an absolute immunity from private lawsuits alleging constitutional

violations—consequences found sufficient in *Spalding v. Vilas*, 161 U. S. 483 (1896), and *Barr v. Matteo*, 360 U. S. 564 (1959), to warrant extension to such officials of absolute immunity from suits at common law—we emphasized our expectation that insubstantial suits need not proceed to trial:

“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 *Scheur* 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.” 438 U. S., at 507-508 (citations omitted).

Butz continued to acknowledge that the special functions of some officials might require absolute immunity. But the Court held that “federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.” *Id.*, at 506. This we reaffirmed today in *Nixon v. Fitzgerald*, *ante*, at —.

III

A

Petitioners argue that public policy requires a blanket extension of absolute immunity to Presidential aides. In deciding this claim we do not write on an empty page. In *Butz v. Economou*, *supra*, the Secretary of Agriculture—a Cabinet official directly accountable to the President—asserted a defense of absolute official immunity from suit for civil dam-

ages. We rejected his claim. In so doing we did not question the power or the importance of the Secretary's office. Nor did we doubt the importance to the President of loyal and efficient subordinates in executing his duties of office. Yet we found these factors, alone, to be insufficient to justify absolute immunity. "[T]he greater power of [high] officials," we reasoned, "affords a greater potential for a regime of lawless conduct." 438 U. S., at 506. Damages actions against high officials were therefore "an important means of vindicating constitutional guarantees." *Ibid.* Moreover, we found that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Id.*, at 504.

Having decided in *Butz* 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.

B

In disputing the controlling authority of *Butz*, petitioners rely on the principles developed in *Gravel v. United States*, 408 U. S. 606 (1972).¹² In *Gravel* we endorsed the view that

¹² Petitioners also claim support from other cases that have followed *Gravel* in holding that Congressional employees are derivatively entitled to the legislative immunity provided to United States Senators and Representatives under the Speech and Debate Clause. See *Eastland v. United*

"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. . . ." *Id.*, at 616-617. 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. *Id.*, at 621-622.

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 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 itself¹²—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. In *Gravel*,

States Servicemen's Fund, 421 U. S. 481 (1975); *Doe v. McMillan*, 412 U. S. 306 (1973).

¹² See U. S. Const., Art. 2, § 2 ("The President . . . may require the Opinion, in writing, or the principal Officer in each of the executive Departments, upon any Subject relating to the duties of their respective Offices. . . .").

for example, we emphasized that Senators and their aides were absolutely immune only when performing "acts legislative in nature," and not when taking other acts even "in their official capacity." 408 U. S., at 625. See *Hutchinson v. Proxmire*, 443 U. S. 111, 125-133 (1979). Our cases involving judges¹⁴ and prosecutors¹⁵ have followed a similar line. The undifferentiated extension of absolute "derivative" immunity 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.¹⁶

C

Petitioners also assert an entitlement to immunity based on the "special functions" of White House aides. This form of argument is in accord with the analytical approach of our cases. For aides entrusted with discretionary authority in

¹⁴ See, e. g., *Supreme Court of Virginia v. Virginia Consumers Union*, 446 U. S. 719, 731-737 (1980); *Stump v. Sparkman*, *supra*, 438 U. S., at 362.

¹⁵ In *Imbler v. Pachtman*, 424 U. S. 409, 430-431 (1975), this Court reserved the question whether absolute immunity would extend to "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer." Since that time the courts of appeals generally have ruled prosecutors do not enjoy absolute immunity for acts taken in those capacities. See, e. g., *Mancini v. Lester*, 630 F. 2d 990, 992 (CA3 1980); *Forsyth v. Kleindeinst*, 599 F. 2d 1203, 1213-1214 (CA3 1979). This Court at least implicitly has drawn the same distinction in extending absolute immunity to executive officials when they are engaged in quasi-prosecutorial functions. See *Butz v. Economou*, *supra*, 438 U. S., at 515-517.

¹⁶ Our decision today in *Nixon v. Fitzgerald*, *ante*, in no way abrogates this general rule. As we explained in that opinion, the recognition of absolute immunity for all of a President's acts in office derives in principal part from factors unique to his constitutional station. Suits against other officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself. See *ante*, at —.

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.¹¹ But a "special functions" rationale does not warrant a blanket recognition of absolute immunity for all Presidential aides in the performance of all their duties. This conclusion too follows from our decision in *Butz*, which establishes that an executive official's claim to absolute immunity must be justified by reference to the public interest in the special functions of his office, not the mere fact of high station.¹²

Butz also identifies the location of the burden of proof. The burden of justifying absolute immunity rests on the official asserting the claim. 438 U. S., at 506. We have not of course had occasion to identify how a Presidential aide might carry this burden. But the general requisites are familiar in our cases. In order to establish entitlement to absolute immunity a Presidential aide first must show that the respon-

¹¹ Cf. *United States v. Nixon*, 418 U. S. 683, 710-711 (1974) ("[C]ourts have traditionally shown the utmost deference to Presidential responsibilities" for foreign policy and military affairs, and claims of privilege in this area would receive a higher degree of deference than invocations of "a President's generalized interest in confidentiality."); *Katz v. United States*, 389 U. S. 347, 364 (1967) (White, J., concurring) ("We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.") (emphasis added).

¹² *Gravel, supra*, points to a similar conclusion. We fairly may assume that some aides are assigned to act as Presidential "alter egos," *Gravel, supra*, 408 U. S., at 616-617, in the exercise of functions for which absolute immunity is "essential for the conduct of the public business," *Butz, supra*, 438 U. S., at 507. Cf. *Gravel, supra*, 408 U. S., at 620 (derivative immunity extends only to acts within the "central role" of the Speech and Debate Clause in permitting free legislative speech and debate). By analogy to *Gravel*, a derivative claim to Presidential immunity would be strongest in such "central" Presidential domains as foreign policy and national security, in which the President could not discharge his singularly vital mandate without delegating functions nearly as sensitive as his own.

sibilities of his office embraced a function so sensitive as to require a total shield from liability.¹⁹ He then must demonstrate that he was in fact discharging the protected function when he performed the act for which liability is asserted.²⁰

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." *Butz, supra*, 438 U. S., at 506. 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. We do not, however, foreclose the possibility that petitioners, on remand, could satisfy the standards properly applicable to their claims.

IV

Even if they cannot establish that their official functions require absolute immunity, petitioners assert that public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial. We agree.

A

As we recognized today in *Nixon v. Fitzgerald, ante*, at —, the resolution of immunity questions inherently re-

¹⁹ Here as elsewhere the relevant judicial inquiries would encompass considerations of public policy, the importance of which should be confirmed either by reference to the common law or, more likely, our constitutional heritage and structure. See *Nixon v. Fitzgerald, ante*, at —.

²⁰ The need for such an inquiry is implicit in *Butz v. Economou, supra*, 438 U. S., at 508-517; see *Imbler v. Pachtman*, 424 U. S. 409, 430-431 (1976). Cases involving immunity under the Speech and Debate Clause have inquired explicitly into whether particular acts and activities qualified for the protection of the Clause. See, e. g., *Hutchinson v. Proxmire, supra*; *Doe v. McMillan*, 412 U. S. 306 (1973); *Gravel v. United States, supra*.

quires "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. *Butz v. Economou*, *supra*, 438 U. S., at 506; see *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 410 (1971) ("For people in Bivens' shoes, it is damages or nothing."). It is this recognition that has required the denial of absolute immunity to most public officers. 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 the society as a whole.²¹ These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from the acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties. *Gregoire v. Biddle*, 177, F. 2d 579, 581 (CA2 1949), cert. denied, 339 U. S. 949 (1950). See *Nixon v. Fitzgerald*, *ante*, at

In identifying qualified immunity as the best attainable accommodation of competing values, in *Butz*, *supra*, 438 U. S., at 507-508, as in *Scheuer*, *supra*, 416 U. S., at 245-248, we relied on the assumption that this standard would permit "[i]nsubstantial lawsuits [to] be quickly terminated." *Butz*, *supra*, 438 U. S., at 507-508; see *Hanrahan v. Hampton*, 446 U. S. 754, 765 (POWELL, J., concurring in part and dissenting in part).²² Yet petitioners advance persuasive arguments

²¹ See generally Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup. Ct. Rev. 281, 324-327.

²² The importance of this consideration hardly needs emphasis. This Court has noted the risk imposed upon political officials who must defend their actions and motives before a jury. See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U. S. 391, 405 (1979); *Tenney v. Brandhove*, 341 U. S. 367, 377-378 (1951). As the Court observed in *Ten-*

that the dismissal of insubstantial lawsuits without trial—a factor presupposed in the balance of competing interests struck by our prior cases—requires an adjustment of the “good faith” standard established by our decisions.

B

Qualified or “good faith” immunity is an affirmative defense that must be pleaded by a defendant official. *Gomez v. Toledo*, 446 U. S. 635 (1980).²² 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.” *Wood v. Strickland*, 420 U. S. 308, 320 (1975). The subjective component refers to “permissible intentions.” *Ibid.* Characteristically the Court has defined these elements by identifying the circumstances in which qualified immunity would *not* be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if 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.* . . .” *Id.*, at 321–322 (emphasis added).²³

ney, “In times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed.” 341 U. S., at 378. It is for this among other reasons that *Butz*, *supra*, admonished that insubstantial suits should “not proceed to trial, but can be terminated on a properly supported motion for summary judgment.” 438 U. S., at 508.

²² Although *Gomez* presented the question in the context of an action under § 1983, the Court’s analysis indicates that “immunity” must also be pleaded as a defense in actions under the Constitution and laws of the United States. See 446 U. S., at 640. *Gomez* did not decide which party bore the burden of proof on the issue of good faith. *Id.*, at 642 (REHNQUIST, J., concurring).

²³ In *Wood* the Court explicitly limited its holding to the circumstances in which a school board member, “in the specific context of school discipline,”

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.²⁵ Yet an official's subjective good faith has been considered to be a question of fact, which some courts apparently have regarded as inherently requiring resolution by a jury.²⁶

Viewed in the context of *Butz*'s attempted balancing of competing values, substantial costs attend the litigation of

420 U. S., at 321, would be stripped on claimed immunity in an action under § 1983. Subsequent cases, however, have quoted the *Wood* formulation as a general statement of the qualified immunity standard. See, e. g., *Procunier v. Navarette*, 434 U. S. 555, 562-563, 566 (1978), quoted in *Baker v. McCollan*, 448 U. S. 137, 139 (1979). The two-pronged standard as phrased in *Wood* actually is somewhat redundant in many if not in most cases. If the defendant neither knew nor should have known that his conduct would violate the plaintiff's constitutional rights, it follows that the defendant could not have acted with a malicious intent to cause a deprivation of constitutional rights of which he knew nothing. The subjective standard thus would be meaningful only in a case in which a defendant acted without knowing that his conduct violated the Constitution, but intending to inflict "other [actionable] injury."

²⁵ The Rule states that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether summary judgment is proper, a court ordinarily must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party. E. g., *Poller v. Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962).

²⁶ E. g., *Landrum v. Moats*, 576 F. 2d 1320, 1329 (CA8 1978) (good faith "is dependent on motivation and conduct . . . as established at trial") (emphasis added); *Duchene v. Sugarman*, 566 F. 2d 817, 883 (CA2 1977) (question of good faith is "peculiarly within the jury's province"); cf. *Hutchinson v. Proxmire*, 443 U. S. 111, 120 n. 9 (1979) (questioning whether the existence of "actual malice," as an issue of fact, may properly be decided on summary judgment in a suit alleging libel of a public figure).

the subjective good faith of high officials of the Executive Branch. The duties of these officers often require decisions on controversial issues of gravest importance, in an environment in which views inevitably are affected by loyalty, ideology, and emotion. This environment in part explains why questions of intent so rarely can be decided by summary judgment. Yet it also frames a background in which there often is no clear end to the evidence that may be probative of subjective intent. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous officials. Litigation burdens of this kind not only can distract officials from the performance of their duties.²⁷ At least in the case of such high officials as the

²⁷ As Judge Gesell observed in his concurring opinion in *Kissinger v. Halperin*, 606 F. 2d 1192, 1214 (CA DC 1979), *aff'd* by an equally divided vote, 452 U. S. 713 (1981):

"We should not close our eyes to the fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials based on alleged constitutional torts. Each such suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discover [sic] is wide-ranging, time-consuming, and not without considerable cost to the officials involved. It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient [to force a trial] . . . The effect of this development upon the willingness of individuals to serve their country is obvious."

In *Butz* we concluded that absolute immunity is unnecessary to protect the public interest in "encouraging the vigorous exercise of official authority", 438 U. S. at 506, because we believed that qualified immunity would adequately shield officials from liability for good faith mistakes. We assumed that such immunity would prove "workable". There are indica-

President's closest aides, separation-of-powers concerns also require that such inquiries into executive decisionmaking should not be undertaken lightly.²⁸

tions, however, that some District Courts may not have understood our admonition in *Butz* that "insubstantial" suits against high public officials should not be allowed to proceed to trial. 438 U. S., at 438. See *Schuck*, *supra*, 1980 Sup. Ct. Rev., at 324-327. We reiterate this admonition.

In so doing, we continue to recognize that "In situations of abuse, an action against the responsible official can be an important means of vindicating constitutional guarantees." *Butz*, *supra*, 438 U. S., at 506. This concern applies with special force in the case of officials whose "greater power . . . affords a greater potential for lawless conduct." *Ibid.* We only repeat that insubstantial lawsuits undermine the effectiveness of Government as contemplated by our constitutional structure, and that "firm application of the Federal Rules of Civil Procedure" is fully warranted in such cases. *Id.*, at 508. Under those rules a plaintiff retains, of course, access to reasonable discovery to aid in carrying his burden of raising a material issue of fact. And he need not prove the merits of his case on a motion for summary judgment.

²⁸ See *Nixon v. Fitzgerald*, *ante*, at —; *Nixon v. Administrator of General Services Administration*, 433 U. S. 425, 433 (1977); *United States v. Nixon*, 418 U. S. 683, 711-712 (1974). As the Court recognized in *United States v. Nixon* 418 U. S., at 706-706, 708:

"A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."

Many of the policy considerations implicated by Presidential communications would apply with nearly equal force to communications among Presidential aides and other high Executive officials. The separation-of-powers concerns are different in the two cases, being less weighty where the President personally is not involved. As commentators have observed, however, the "separation of powers" is "a 'political doctrine' and not a technical rule of law." Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempt Cases in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1014 (1924) (footnote omitted). Even where the separation-of-powers doctrine imposes no absolute barrier to judicial functions intruding on the functioning of the Executive

As we affirmed in *Nixon v. Fitzgerald*, ante, there are situations in which sufficiently compelling justifications exist. In the case of private suits for damages, however, we conclude today that bare allegations of malice should not suffice either to subject high federal officials to the costs of trial or to license broad-reaching discovery. Consistently with the balance at which we aimed in *Butz*, we therefore hold that at least high executive officials are shielded from liability for civil damages insofar as their conduct does not violate "settled, indisputable" legal rights of which a reasonable person would have known. *Wood v. Strickland*, supra, 420 U. S., at 321.²⁰ Absent a clear congressional decision to the contrary, we conclude that public policy will not support the cost of conditioning their immunity on proof of subjective intent.²¹

Reliance on the objective reasonableness of an official's conduct, as measured by reference to settled, indisputable law,²² should avoid excessive disruption of government and

Branch, the doctrine does require a judicial consideration of the constitutional interests at stake in cases of particular kinds. See *Nixon v. Fitzgerald*, ante, at —; *Nixon v. Administrator of General Services Administration*, supra, 433 U. S., at 443 (1977); *United States v. Nixon*, supra, 418 U. S., at 711-712 (1974).

²⁰ This case involves no issue concerning the elements of the immunity defense for lower level officials, nor does it present any question of the immunity available to state officials sued for constitutional violations under § 1983. We do not purport to resolve questions that might be framed by cases not properly before us. As we recognized in *Scheur v. Rhodes*, supra, 416 U. S., at 247, the qualified immunity defenses possessed by different officials should be determined by reference to "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based."

²¹ This case involves no claim that Congress has expressed its intent to impose "no fault" tort liability on high federal officials for violations of particular statutes or the Constitution.

²² As in *Procunier v. Navarette*, 434 U. S. 555, 565 (1978), we need not define here the circumstances under which "the state of the law" should be "evaluated by reference to the opinions of this Court, of the Courts of Ap-

permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine what the law was at the time the action occurred and in most cases what a reasonable person could have been expected to know about it.³² Until this threshold immunity question is resolved, extensive discovery generally should not be allowed.

omission

By defining the limits on a high official's qualified immunity solely in "objective" terms, we provide no license to lawless conduct. The public interest in deterrence of constitutional violations and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts.³³ Where an official knows that his conduct will violate constitutional rights, he should be made to hesitate. Where his duties legitimately require action in which established rights are not implicated—even if the action po-

peals, or of the local District Court."

³² Cf. *Procunier v. Navarette*, *supra*, 434 U. S., at 566 (footnote omitted) ("Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for established law that their conduct 'cannot reasonably be characterized as being in good faith.'")

³³ A victim of wrongful behavior by a public official frequently may be able to obtain compensation by means other than a private suit for damages against the individual wrongdoer in a federal court. In this case, for example, Fitzgerald invoked civil service remedies that resulted in a judgment entitling him to reinstatement and backpay. See Civil Service Commission, *Decision on the Appeal of A. Ernest Fitzgerald* (Sept. 18, 1973). Where relief is available from the Government, as under the Civil Service Act, no immunity defense generally will be recognized. Even under the Federal Tort Claims Act, 28 U. S. C. §§ 1346(b) and 2671-2680, which provides certain exemptions from Government liability, including one for "discretionary functions," see *Dalehite v. United States*, 346 U. S. 15 (1953), this Court has held that "the very purpose of [Congress] was to waive the Government's traditional all-encompassing immunity" and that there is "no justification for this Court to read exemptions into the Act beyond those provided by Congress," *Rayonier, Inc. v. United States*, 352 U. S. 315, 319, 320 (1957).

tentially is harmful to someone that the official dislikes—the public interest frequently may be served better by fearless and unhesitating action.³⁴

C

In this case petitioners have asked us to hold that the respondent's pre-trial showings were insufficient to survive their motion for summary judgment. We think it appropriate, however, to remand the case to the District Court, for its reconsideration of this issue in light of this opinion.³⁵ The trial court is more familiar with the record so far developed and also is better situated to make any such further findings as may be necessary.

V

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

So ordered.

³⁴ We emphasize that we hold only that a high federal official is shielded against liability for civil damages arising from actions within the scope of his duties and in "objective" good faith. We express no view as to the conditions in which injunctive or declaratory relief might be available.

³⁵ Petitioners also have urged us, prior to the remand, to rule on the legal sufficiency of respondent's "implied" causes of action under 5 U. S. C. § 7211 and 18 U. S. C. § 1505 and his *Bivens* claim under the First Amendment. We do not view either the statutory or the constitutional question as insubstantial. Cf. *Texas Industries, Inc. v. Radcliff Materials*, 451 U. S. 620, 638-639 (1981) (controlling question in implication of statutory causes of action is whether Congress affirmatively intended to create a damages remedy); *Bush v. Lucas*, 647 F. 2d 573, 576 (CA5 1981), affirming on remand 598 F. 2d 958 (CA5 1979) (holding that the "unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a *Bivens* remedy"). As in *Nixon v. Fitzgerald*, *ante*, however, we took jurisdiction of the case only to resolve the immunity question under the collateral order doctrine. We therefore think it appropriate to leave these questions for fuller consideration by the District Court and, if necessary, by the Court of Appeals.

Stylistic changes throughout

Footnotes renumbered

9-10, 16, 17, 18, 19

(8 included changes made
since last circulated draft)

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

L.F.P.

(my
personal
copy)

From: Justice Powell

Circulated: _____

Recirculated: _____

3rd DRAFT

5/24/82

SUPREME COURT OF THE UNITED STATES

No. 80-945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS, v. A. ERNEST FITZGERALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[May —, 1982]

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.

I

In this suit for civil damages petitioners Bryce Harlow and Alexander Butterfield are alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the respondent A. Ernest Fitzgerald. Respondent avers that petitioners entered the conspiracy in their capacities as senior White House aides to former President Richard M. Nixon. As the alleged conspiracy is the same as that involved in *Nixon v. Fitzgerald*, ante, the facts need not be repeated in detail.

Respondent claims that Harlow joined the conspiracy in his role as the Presidential aide principally responsible for congressional relations.¹ At the conclusion of discovery the

¹ Harlow held this position from the beginning of the Nixon Administration on January 20, 1969 through November 4, 1969. On that date he was designated as Counsellor to the President, a position accorded Cabinet status. He served in that capacity until December 9, 1970, when he returned to private life. Harlow later resumed the duties of Counsellor for the pe-

(Bryson's letter attached)

Approved
by JPS
on 5/24

Bryson
approved
for "now"
& agreed
for me
to circulate
5/25

supporting evidence remained inferential. As evidence of Harlow's conspiratorial activity respondent relies heavily on a series of conversations in which Harlow discussed Fitzgerald's dismissal with Air Force Secretary Robert Seamans.² The other evidence most supportive of Fitzgerald's claims consists in a recorded conversation in which the President later voiced a tentative recollection that Harlow was "all for canning" Fitzgerald.³

Disputing Fitzgerald's contentions, Harlow argues that exhaustive discovery has adduced no direct evidence of his in-

riod from July 1, 1973 through April 14, 1974. Respondent appears to allege that Harlow continued in a conspiracy against him throughout the various changes of official assignment.

²The record reveals that Secretary Seamans called Harlow in May, 1969, to inquire about likely congressional reaction to a draft reorganization plan that would cause Fitzgerald's dismissal. According to Seamans' testimony, "we [the Air Force] didn't ask [Harlow] to pass judgment on the action itself. We just asked him what the impact would be in the relationship with the Congress." App. 153, 164-165 (Deposition of Robert Seamans). Through an aide Harlow responded that "this was a very sensitive item on the Hill and that it would be [his] recommendation that [the Air Force] not proceed to make such a change at that time." *Id.*, at 152. But the Air Force persisted. Seamans spoke to Harlow on at least one subsequent occasion during the spring of 1969. The record also establishes that Secretary Seamans called Harlow on November 4, 1969, shortly after the public announcement of Fitzgerald's impending dismissal, and again in December 1969. See App. 186.

³See App. 284. (Transcript of a Recorded Conversation between Richard Nixon and Ronald Ziegler, February 26, 1973). In a conversation with the President on January 31, 1973, John Ehrlichman also recalled that Harlow had discussed the Fitzgerald case with the President. See App. 218-221. (Transcript of Recorded Conversation between Richard Nixon and John Ehrlichman, January 31, 1973). In the same conversation the President himself asserted that he had spoken to Harlow about the Fitzgerald matter, see *id.*, at 218, but the parties continue to dispute whether Mr. Nixon—at the most relevant moments in the discussion—was confusing Fitzgerald's case with that of another dismissed employee. The President explicitly stated at one point that he previously had been confused. See *id.*, at 220.

volvement in any wrongful activity.⁴ Petitioner avers that Secretary Seamans advised him that considerations of efficiency required Fitzgerald's removal by a reduction in force, despite anticipated adverse congressional reaction. Harlow asserts he had no reason to believe that a conspiracy existed. He contends that he took all his actions in good faith.⁵

Petitioner Butterfield also is alleged to have entered the conspiracy not later than May 1969. Employed as Deputy Assistant to the President and Deputy Chief of Staff to H.R. Haldeman,⁶ Butterfield circulated a White House memorandum in that month in which he claimed to have learned that Fitzgerald planned to "blow the whistle" on some "shoddy purchasing practices" by exposing these practices to public view.⁷ Fitzgerald characterizes this memorandum as evi-

⁴See Defendants Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment (Memorandum in Support of Summary Judgment), at 7 (Civil No. 74-178, Feb. 12, 1980).

⁵In support of his version of events Harlow relies particularly on the deposition testimony of Air Force Secretary Seamans, who stated that he regarded abolition of Fitzgerald's position as necessary "to improve the efficiency" of the Financial Management Office of the Air Force and that he never received any White House instruction regarding the Fitzgerald case. App. 159-160. Petitioner also disputes the probative value of Richard Nixon's recorded remark that Harlow had supported Fitzgerald's firing. Harlow emphasizes the tentativeness of the President's statement. To the President's query whether Harlow was "all for canning [Fitzgerald], wasn't he?", White House Press Secretary Ronald Ziegler in fact gave a negative reply: "No, I think Bryce may have been the other way." App. 284. The President did not respond to Ziegler's comment.

⁶The record establishes that Butterfield worked from an office immediately adjacent to the oval office. He had almost daily contact with the President until March 1973, when he left the White House to become Administrator of the Federal Aviation Administration.

⁷App. 274. Butterfield reported that this information had been referred to the Federal Bureau of Investigation. In the memorandum Butterfield reported that he had received the information "by word of several mouths, but allegedly from a senior AFL-CIO official originally Evidently, Fitzgerald attended a recent meeting of the National Democratic

dence that Butterfield had commenced efforts to secure Fitzgerald's retaliatory dismissal. As evidence that Butterfield participated in the conspiracy to conceal his unlawful discharge and prevent his reemployment, Fitzgerald relies heavily on communications between Butterfield and Haldeman in December 1969 and January 1970. After the President had promised at a press conference to inquire into Fitzgerald's dismissal, Haldeman solicited Butterfield's recommendations. In a subsequent memorandum emphasizing the importance of "loyalty," Butterfield counselled against offering Fitzgerald another job in the Administration at that time.⁸

For his part, Butterfield denies that he was involved in any decision concerning Fitzgerald's employment status until Haldeman sought his advice in December 1969—more than a month after Fitzgerald's termination had been scheduled and announced publicly by the Air Force. Butterfield states that he never communicated his views about Fitzgerald to any official of the Defense Department. He argues generally that nearly eight years of discovery have failed to turn up any evidence that he caused injury to Fitzgerald.⁹

Together with their codefendant Richard Nixon, petitioners Harlow and Butterfield moved for summary judgment on February 12, 1980. In denying the motion the District Court upheld the legal sufficiency of Fitzgerald's *Bivens* claim under the First Amendment and his "inferred" statu-

Coalition and, while there, revealed his intentions to a labor representative who, fortunately for us, was unsympathetic." *Ibid.*

⁸ App. 99-100, 180-181. This memorandum was not sent to the Defense Department.

⁹ See Memorandum in Support of Summary Judgment, *supra*, at 26. The history of Fitzgerald's litigation is recounted in *Nixon v. Fitzgerald*, *ante*. Butterfield was named as a defendant in the initial civil action filed by Fitzgerald in 1974. Harlow was named for the first time in respondent's Second Amended Complaint of July 6, 1978.

tory causes of action under 5 U. S. C. § 7211 and 18 U. S. C. § 1505.¹⁰ The court found that genuine issues of disputed fact remained for resolution at trial. It also ruled that petitioners were not entitled to absolute immunity. Pet. App. 1-3.

Independently of former President Nixon, petitioners invoked the collateral order doctrine and appealed the denial of their immunity defense to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed the appeal without opinion. Pet. App. 11-12. Never having determined the immunity available to the senior aides and advisers of the President of the United States, we granted certiorari. 452 U. S. 957 (1981).¹¹

II

As we reiterated today in *Nixon v. Fitzgerald*, *ante*, our decisions consistently have held that government officials are

¹⁰The first of these statutes, 5 U. S. C. § 7211 (Supp. III 1979), provides generally that "The right of employees . . . to . . . furnish information to either House of Congress, or to a committee or a Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. Neither expressly creates a private right to sue for damages. Petitioners argue that the District Court erred in finding that a private cause of action could be inferred under either statute, and that "special factors" present in the context of the federal employer-employee relationship preclude the recognition of respondent's *Bivens* action under the First Amendment. The legal sufficiency or respondent's asserted causes of action is not, however, a question that we view as properly presented for our decision in the present posture of this case. See note 35, *infra*.

¹¹As in *Nixon v. Fitzgerald*, *ante*, our jurisdiction has been challenged on the basis that the District Court's order denying petitioners' claim of absolute immunity was not an appealable final order and that the Court of Appeals' dismissal of petitioners' appeal establishes that this case was never "in" the Court of Appeals within the meaning of 28 U. S. C. § 1254. As the discussion in *Nixon* establishes our jurisdiction in this case as well, we need not consider those challenges in this opinion.

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." The absolute immunity of legislators, in their legislative functions, see, e. g., *Eastland v. United States Servicemen's Fund*, 421 U. S. 491 (1975), and of judges, in their judicial functions, see, e. g., *Stump v. Sparkman*, 435 U. S. 349 (1978), now is well settled. Our decisions also have extended absolute immunity to certain officials of the Executive Branch. These include prosecutors and similar officials, see *Butz v. Economou*, 438 U. S. 478, 508-512 (1978), executive officers engaged in adjudicative functions, *id.*, at 513-517, and the President of the United States, see *Nixon v. Fitzgerald*, *ante*.

For executive officials in general, however, our cases make plain that qualified immunity represents the norm. In *Scheuer v. Rhodes*, 416 U. S. 232 (1974), we acknowledged that high officials require greater protection than those with less complex discretionary responsibilities. Nonetheless, we held that a governor and his aides could receive the requisite protection from qualified or good-faith immunity. *Id.*, at 247-248. In *Butz v. Economou*, *supra*, we extended the approach of *Scheuer* to high federal officials of the Executive Branch. Discussing in detail the considerations that also had underlain our decision in *Scheuer*, we explained that the recognition of a qualified immunity defense for high executives reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, 438 U. S., at 504-505, but also "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Id.*, at 506. Without discounting the

adverse consequences of denying high officials an absolute immunity from private lawsuits alleging constitutional violations—consequences found sufficient in *Spalding v. Vilas*, 161 U. S. 483 (1896), and *Barr v. Matteo*, 360 U. S. 564 (1959), to warrant extension to such officials of absolute immunity from suits at common law—we emphasized our expectation that insubstantial suits need not proceed to trial:

“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 *Scheur* 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.” 438 U. S., at 507–508 (citations omitted).

Butz continued to acknowledge that the special functions of some officials might require absolute immunity. But the Court held that “federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.” *Id.*, at 506. This we reaffirmed today in *Nixon v. Fitzgerald*, *ante*, at —.

III

A

Petitioners argue that public policy requires a blanket extension of absolute immunity to Presidential aides. In deciding this claim we do not write on an empty page. In *Butz v. Economou*, *supra*, the Secretary of Agriculture—a Cabinet

official directly accountable to the President—asserted a defense of absolute official immunity from suit for civil damages. We rejected his claim. In so doing we did not question the power or the importance of the Secretary's office. Nor did we doubt the importance to the President of loyal and efficient subordinates in executing his duties of office. Yet we found these factors, alone, to be insufficient to justify absolute immunity. "[T]he greater power of [high] officials," we reasoned, "affords a greater potential for a regime of lawless conduct." 438 U. S., at 506. Damages actions against high officials were therefore "an important means of vindicating constitutional guarantees." *Ibid.* Moreover, we found that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Id.*, at 504.

Having decided in *Butz* 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.

B

In disputing the controlling authority of *Butz*, petitioners rely on the principles developed in *Gravel v. United States*, 408 U. S. 606 (1972).¹² In *Gravel* we endorsed the view that

¹²Petitioners also claim support from other cases that have followed *Gravel* in holding that Congressional employees are derivatively entitled to

"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. . . ." *Id.*, at 616-617. 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. *Id.*, at 621-622.

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 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 itself¹³—be absolutely immune. Yet we implicitly rejected such derivative immunity in *Butz*.¹⁴ Moreover, in general our cases have followed a

the legislative immunity provided to United States Senators and Representatives under the Speech and Debate Clause. See *Eastland v. United States Servicemen's Fund*, 421 U. S. 491 (1976); *Doe v. McMillan*, 412 U. S. 306 (1973).

¹³See U. S. Const., Art. 2, §2 ("The President . . . may require the Opinion, in writing, or the principal Officer in each of the executive Departments, upon any Subject relating to the duties of their respective Offices. . . .").

¹⁴THE CHIEF JUSTICE, *post*, at 7, argues that senior Presidential aides work "more intimately on a daily basis [with the President] than does a Cabinet officer," and that *Butz* therefore is not controlling. In recent

"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. In *Gravel*, for example, we emphasized that Senators and their aides were absolutely immune only when performing "acts legislative in nature," and not when taking other acts even "in their official capacity." 408 U. S., at 625. See *Hutchinson v. Proxmire*, 443 U. S. 111, 125-133 (1979). Our cases involving judges¹⁵ and prosecutors¹⁶ have followed a similar line. The undifferentiated extension of absolute "derivative" immunity 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.¹⁷

years, however, such men as Henry Kissinger and James Schlesinger have served in both Presidential advisory and Cabinet positions. Kissinger held both posts simultaneously. In our view it is impossible to generalize about the role of "offices" in a particular President's administration without reference to the functions that particular officeholders are assigned by the President.

¹⁵ See, e. g., *Supreme Court of Virginia v. Virginia Consumers Union*, 446 U. S. 719, 731-737 (1980); *Stump v. Sparkman*, *supra*, 438 U. S., at 362.

¹⁶ In *Imbler v. Pachtman*, 424 U. S. 409, 430-431 (1973), this Court reserved the question whether absolute immunity would extend to "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer." Since that time the courts of appeals generally have ruled prosecutors do not enjoy absolute immunity for acts taken in those capacities. See, e. g., *Mancini v. Lester*, 630 F. 2d 990, 992 (CA8 1980); *Forsyth v. Kleindeinst*, 599 F. 2d 1203, 1213-1214 (CA3 1979). This Court at least implicitly has drawn the same distinction in extending absolute immunity to executive officials when they are engaged in quasi-prosecutorial functions. See *Butz v. Economou*, *supra*, 438 U. S., at 515-517.

¹⁷ Our decision today in *Nixon v. Fitzgerald*, *ante*, in no way abrogates this general rule. As we explained in that opinion, the recognition of absolute immunity for all of a President's acts in office derives in principal part

C

Petitioners also assert an entitlement to immunity based on the "special functions" of White House aides. This form of argument is in accord with the analytical approach of our cases. 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.¹⁸ But a "special functions" rationale does not warrant a blanket recognition of absolute immunity for all Presidential aides in the performance of all their duties. This conclusion too follows from our decision in *Butz*, which establishes that an executive official's claim to absolute immunity must be justified by reference to the public interest in the special functions of his office, not the mere fact of high station.¹⁹

from factors unique to his constitutional station. Suits against other officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself. See *ante*, at —.

¹⁸ Cf. *United States v. Nixon*, 418 U. S. 683, 710-711 (1974) ("[C]ourts have traditionally shown the utmost deference to Presidential responsibilities" for foreign policy and military affairs, and claims of privilege in this area would receive a higher degree of deference than invocations of "a President's generalized interest in confidentiality."); *Katz v. United States*, 389 U. S. 347, 364 (1967) (White, J., concurring) ("We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.") (emphasis added).

¹⁹ *Gravel, supra*, points to a similar conclusion. We fairly may assume that some aides are assigned to act as Presidential "alter egos," *Gravel, supra*, 408 U. S., at 616-617, in the exercise of functions for which absolute immunity is "essential for the conduct of the public business," *Butz, supra*, 438 U. S., at 507. Cf. *Gravel, supra*, 408 U. S., at 620 (derivative immunity extends only to acts within the "central role" of the Speech and Debate Clause in permitting free legislative speech and debate). By analogy to *Gravel*, a derivative claim to Presidential immunity would be strongest in

Butz also identifies the location of the burden of proof. The burden of justifying absolute immunity rests on the official asserting the claim. 438 U. S., at 506. We have not of course had occasion to identify how a Presidential aide might carry this burden. But the general requisites are familiar in our cases. 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.²⁰ He then must demonstrate that he was in fact discharging the protected function when he performed the act for which liability is asserted.²¹

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." *Butz, supra*, 438 U. S., at 506. 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. We do not, however, foreclose the possibility that petitioners, on remand, could satisfy the standards properly applicable to their claims.

such "central" Presidential domains as foreign policy and national security, in which the President could not discharge his singularly vital mandate without delegating functions nearly as sensitive as his own.

²⁰ Here as elsewhere the relevant judicial inquiries would encompass considerations of public policy, the importance of which should be confirmed either by reference to the common law or, more likely, our constitutional heritage and structure. See *Nixon v. Fitzgerald, ante*, at —.

²¹ The need for such an inquiry is implicit in *Butz v. Economou, supra*, 438 U. S., at 508-517; see *Imbler v. Pachtman*, 424 U. S. 409, 430-431 (1976). Cases involving immunity under the Speech and Debate Clause have inquired explicitly into whether particular acts and activities qualified for the protection of the Clause. See, e. g., *Hutchinson v. Proxmire, supra*; *Doe v. McMillan*, 412 U. S. 306 (1973); *Gravel v. United States, supra*.

IV

Even if they cannot establish that their official functions require absolute immunity, petitioners assert that public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial. We agree.

A

As we recognized today in *Nixon v. Fitzgerald*, ante, at —, 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. *Butz v. Economou*, supra, 438 U. S., at 506; see *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 410 (1971) (“For people in Bivens’ shoes, it is damages or nothing.”). It is this recognition that has required the denial of absolute immunity to most public officers. 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 the society as a whole.²² These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from the acceptance of public office. Finally, there is the danger that fear of being sued will “dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.” *Gregoire v. Biddle*, 177, F. 2d 579, 581 (CA2 1949), cert. denied, 339 U. S. 949 (1950). See *Nixon v. Fitzgerald*, ante, at —.

²² See generally Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup. Ct. Rev. 281, 324-327.

In identifying qualified immunity as the best attainable accommodation of competing values, in *Butz*, *supra*, 438 U. S., at 507-508, as in *Scheuer*, *supra*, 416 U. S., at 245-248, we relied on the assumption that this standard would permit "[i]nsubstantial lawsuits [to] be quickly terminated." *Butz*, *supra*, 438 U. S., at 507-508; see *Hanrahan v. Hampton*, 446 U. S. 754, 765 (POWELL, J., concurring in part and dissenting in part).²² Yet petitioners advance persuasive arguments that the dismissal of insubstantial lawsuits without trial—a factor presupposed in the balance of competing interests struck by our prior cases—requires an adjustment of the "good faith" standard established by our decisions.

B

Qualified or "good faith" immunity is an affirmative defense that must be pleaded by a defendant official. *Gomez v. Toledo*, 446 U. S. 635 (1980).²³ 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." *Wood v. Strickland*,

²²The importance of this consideration hardly needs emphasis. This Court has noted the risk imposed upon political officials who must defend their actions and motives before a jury. See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U. S. 391, 405 (1979); *Tenney v. Brandhove*, 341 U. S. 367, 377-378 (1951). As the Court observed in *Tenney*, "In times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed." 341 U. S., at 378. It is for this among other reasons that *Butz*, *supra*, admonished that insubstantial suits should "not proceed to trial, but can be terminated on a properly supported motion for summary judgment." 438 U. S., at 508.

²³Although *Gomez* presented the question in the context of an action under § 1983, the Court's analysis indicates that "immunity" must also be pleaded as a defense in actions under the Constitution and laws of the United States. See 446 U. S., at 640. *Gomez* did not decide which party bore the burden of proof on the issue of good faith. *Id.*, at 642 (REHNQUIST, J., concurring).

420 U. S. 308, 320 (1975). The subjective component refers to "permissible intentions." *Ibid.* Characteristically the Court has defined these elements by identifying the circumstances in which qualified immunity would *not* be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if 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.* . . ." *Id.*, at 321-322 (emphasis added).²⁰

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.²¹ Yet an official's subjective good faith

²⁰ In *Wood* the Court explicitly limited its holding to the circumstances in which a school board member, "in the specific context of school discipline," 420 U. S., at 321, would be stripped of claimed immunity in an action under § 1983. Subsequent cases, however, have quoted the *Wood* formulation as a general statement of the qualified immunity standard. See, e. g., *Procunier v. Navarette*, 434 U. S. 565, 562-563, 566 (1978), quoted in *Baker v. McCollan*, 443 U. S. 137, 139 (1979). The two-pronged standard as phrased in *Wood* actually is somewhat redundant in many if not in most cases. If the defendant neither knew nor should have known that his conduct would violate the plaintiff's constitutional rights, it follows that the defendant could not have acted with a malicious intent to cause a deprivation of constitutional rights of which he knew nothing. The subjective standard thus would be meaningful only in a case in which a defendant acted without knowing that his conduct violated the Constitution, but intending to inflict "other [actionable] injury."

²¹ The Rule states that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment

has been considered to be a question of fact, which some courts apparently have regarded as inherently requiring resolution by a jury.²⁷

Viewed in the context of *Butz's* attempted balancing of competing values, 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 leading up to 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.²⁸ Inquiries of this kind can be peculiarly disruptive of effective government.²⁹

as a matter of law.” Fed. R. Civ. P. 56(c). In determining whether summary judgment is proper, a court ordinarily must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party. *E. g.*, *Poller v. Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962).

²⁷ *E. g.*, *Landrum v. Moats*, 576 F. 2d 1820, 1829 (CA8 1978); *Duchene v. Sugarman*, 566 F. 2d 817, 832–833 (CA2 1977); cf. *Hutchinson v. Proxmire*, 433 U. S. 111, 120, n. 9 (1979) (questioning whether the existence of “actual malice,” as an issue of fact, may properly be decided on summary judgment in a suit alleging libel of a public figure).

²⁸ In suits against a President’s closest aides, discovery of this kind frequently could implicate separation-of-powers concerns. As the Court recognized in *United States v. Nixon*, 418 U. S. 683, 708 (1974):

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" constitutional rights of which a reasonable person would have known. *Procunier v. Navarette*, 434 U. S. 555, 565, (1978); *Wood v. Strickland*, *supra*, 420 U. S., at 321.⁶⁰ Absent a clear congressional decision to the con-

statutory
or

"A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."

⁶⁰ As Judge Gesell observed in his concurring opinion in *Kissinger v. Halperin*, 606 F. 2d 1192, 1214 (CA DC 1979), *aff'd* by an equally divided vote, 452 U. S. 713 (1981):

"We should not close our eyes to the fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials based on alleged constitutional torts. Each such suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discovery [*sic*] is wide-ranging, time-consuming, and not without considerable cost to the officials involved. It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient [to force a trial] The effect of this development upon the willingness of individuals to serve their country is obvious."

⁶¹ This case involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under § 1983.

trary, we conclude that public policy will not support the cost of conditioning their immunity on proof of subjective intent.

Reliance on the objective reasonableness of an official's conduct, as measured by reference to settled, indisputable law,² should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine what the law was at the time the action occurred and in most cases what a reasonable person could have been expected to know about it.³ Until this threshold immunity question is resolved, extensive discovery generally should not be allowed.

By defining the limits of qualified immunity solely in "objective" terms, we provide no license to lawless conduct. The public interest in deterrence of constitutional violations 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 knows that his conduct will violate constitutional rights, he should be made to hesitate; a person who suffers injury caused by such knowing conduct may have a cause of action.⁴ But where an official's duties

clearly
established

illegal
conduct

established

We have found previously, however, that "it would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Butz v. Economou*, 438 U. S., at 504.

Our decision in no way diminishes the absolute immunity currently available to officials whose functions have been held to require a protection of this scope.

² This case involves no claim that Congress has expressed its intent to impose "no fault" tort liability on high federal officials for violations of particular statutes or the Constitution.

³ As in *Procunier v. Navarette*, 434 U. S. 555, 565 (1978), we need not define here the circumstances under which "the state of the law" should be "evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court."

⁴ Cf. *Procunier v. Navarette*, *supra*, 434 U. S., at 565 (footnote omitted) ("Because they could not reasonably have been expected to be aware of a

clearly

legitimately require action in which established rights are not implicated—even if the action potentially is harmful to someone that the official dislikes—the public interest frequently may be served better by fearless and unhesitating action.³⁴

C

In this case petitioners have asked us to hold that the respondent's pre-trial showings were insufficient to survive their motion for summary judgment.³⁵ We think it appropriate, however, to remand the case to the District Court, for its reconsideration of this issue in light of this opinion.³⁶ The

constitutional right that had not yet been declared, petitioners did not act with such disregard for established law that their conduct 'cannot reasonably be characterized as being in good faith.'")

* We emphasize that our decision applies only to suits for civil damages arising from actions within the scope of an official's duties and in "objective" good faith. We express no view as to the conditions in which injunctive or declaratory relief might be available.

* In *Butz*, we admonished that "insubstantial" suits against high public officials should not be allowed to proceed to trial. 433 U. S., at 438. See *Schuck, supra*, 1980 Sup. Ct. Rev., at 324-327. We reiterate this admonition. Insubstantial lawsuits undermine the effectiveness of Government as contemplated by our constitutional structure, and "firm application of the Federal Rules of Civil Procedure" is fully warranted in such cases. *Id.*, at 508.

* Petitioners also have urged us, prior to the remand, to rule on the legal sufficiency of respondent's "implied" causes of action under 5 U. S. C. § 7211 and 18 U. S. C. § 1505 and his *Bivens* claim under the First Amendment. We do not view either the statutory question as insubstantial. Cf. *Texas Industries, Inc. v. Radcliff Materials*, 451 U. S. 630, 638-639 (1981) (controlling question in implication of statutory causes of action is whether Congress affirmatively intended to create a damages remedy); Cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, — U. S. —, — (1982) (controlling question in implication of statutory cause of action is whether Congress affirmatively intended to create a damages remedy); *Texas Industries, Inc. v. Radcliff Materials*, 451 U. S. 630, 638-639 (1981) (same). Nor is the *Bivens* question. Cf. *Bush v. Lucas*, 847 F. 2d 573, 576 (CA5 1981), affirming on remand 598 F. 2d 958 (CA5 1979) (holding that the "unique relationship between the Federal Government and its civil

trial court is more familiar with the record so far developed and also is better situated to make any such further findings as may be necessary.

V

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

So ordered.

service employees is a special consideration which counsels hesitation in inferring a *Bivens* remedy"). As in *Nixon v. Fitzgerald*, *ante*, however, we took jurisdiction of the case only to resolve the immunity question under the collateral order doctrine. We therefore think it appropriate to leave these questions for fuller consideration by the District Court and, if necessary, by the Court of Appeals.

File
To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: _____

*Change on p. 18
will be made
in response to
Sandra's
request of May 26
(7 hours)*
3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS, v. A. ERNEST FITZGERALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[May —, 1982]

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.

I

In this suit for civil damages petitioners Bryce Harlow and Alexander Butterfield are alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the respondent A. Ernest Fitzgerald. Respondent avers that petitioners entered the conspiracy in their capacities as senior White House aides to former President Richard M. Nixon. As the alleged conspiracy is the same as that involved in *Nixon v. Fitzgerald*, *ante*, the facts need not be repeated in detail.

Respondent claims that Harlow joined the conspiracy in his role as the Presidential aide principally responsible for congressional relations.¹ At the conclusion of discovery the

¹ Harlow held this position from the beginning of the Nixon Administration on January 20, 1969 through November 4, 1969. On that date he was designated as Counsellor to the President, a position accorded Cabinet status. He served in that capacity until December 9, 1970, when he returned to private life. Harlow later resumed the duties of Counsellor for the pe-

supporting evidence remained inferential. As evidence of Harlow's conspiratorial activity respondent relies heavily on a series of conversations in which Harlow discussed Fitzgerald's dismissal with Air Force Secretary Robert Seamans.¹ The other evidence most supportive of Fitzgerald's claims consists in a recorded conversation in which the President later voiced a tentative recollection that Harlow was "all for canning" Fitzgerald.²

Disputing Fitzgerald's contentions, Harlow argues that exhaustive discovery has adduced no direct evidence of his in-

riod from July 1, 1973 through April 14, 1974. Respondent appears to allege that Harlow continued in a conspiracy against him throughout the various changes of official assignment.

¹The record reveals that Secretary Seamans called Harlow in May, 1969, to inquire about likely congressional reaction to a draft reorganization plan that would cause Fitzgerald's dismissal. According to Seamans' testimony, "we [the Air Force] didn't ask [Harlow] to pass judgment on the action itself. We just asked him what the impact would be in the relationship with the Congress." App. 153, 164-165 (Deposition of Robert Seamans). Through an aide Harlow responded that "this was a very sensitive item on the Hill and that it would be [his] recommendation that [the Air Force] not proceed to make such a change at that time." *Id.*, at 152. But the Air Force persisted. Seamans spoke to Harlow on at least one subsequent occasion during the spring of 1969. The record also establishes that Secretary Seamans called Harlow on November 4, 1969, shortly after the public announcement of Fitzgerald's impending dismissal, and again in December 1969. See App. 186.

²See App. 284. (Transcript of a Recorded Conversation between Richard Nixon and Ronald Ziegler, February 26, 1973). In a conversation with the President on January 31, 1973, John Ehrlichman also recalled that Harlow had discussed the Fitzgerald case with the President. See App. 218-221. (Transcript of Recorded Conversation between Richard Nixon and John Ehrlichman, January 31, 1973). In the same conversation the President himself asserted that he had spoken to Harlow about the Fitzgerald matter, see *id.*, at 218, but the parties continue to dispute whether Mr. Nixon—at the most relevant moments in the discussion—was confusing Fitzgerald's case with that of another dismissed employee. The President explicitly stated at one point that he previously had been confused. See *id.*, at 220.

volvement in any wrongful activity.⁴ Petitioner avers that Secretary Seamans advised him that considerations of efficiency required Fitzgerald's removal by a reduction in force, despite anticipated adverse congressional reaction. Harlow asserts he had no reason to believe that a conspiracy existed. He contends that he took all his actions in good faith.⁵

Petitioner Butterfield also is alleged to have entered the conspiracy not later than May 1969. Employed as Deputy Assistant to the President and Deputy Chief of Staff to H.R. Haldeman,⁶ Butterfield circulated a White House memorandum in that month in which he claimed to have learned that Fitzgerald planned to "blow the whistle" on some "shoddy purchasing practices" by exposing these practices to public view.⁷ Fitzgerald characterizes this memorandum as evi-

⁴ See Defendants Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment (Memorandum in Support of Summary Judgment), at 7 (Civil No. 74-178, Feb. 12, 1980).

⁵ In support of his version of events Harlow relies particularly on the deposition testimony of Air Force Secretary Seamans, who stated that he regarded abolition of Fitzgerald's position as necessary "to improve the efficiency" of the Financial Management Office of the Air Force and that he never received any White House instruction regarding the Fitzgerald case. App. 159-160. Petitioner also disputes the probative value of Richard Nixon's recorded remark that Harlow had supported Fitzgerald's firing. Harlow emphasizes the tentativeness of the President's statement. To the President's query whether Harlow was "all for canning [Fitzgerald], wasn't he?", White House Press Secretary Ronald Ziegler in fact gave a negative reply: "No, I think Bryce may have been the other way." App. 284. The President did not respond to Ziegler's comment.

⁶ The record establishes that Butterfield worked from an office immediately adjacent to the oval office. He had almost daily contact with the President until March 1973, when he left the White House to become Administrator of the Federal Aviation Administration.

⁷ App. 274. Butterfield reported that this information had been referred to the Federal Bureau of Investigation. In the memorandum Butterfield reported that he had received the information "by word of several mouths, but allegedly from a senior AFL-CIO official originally Evidently, Fitzgerald attended a recent meeting of the National Democratic

dence that Butterfield had commenced efforts to secure Fitzgerald's retaliatory dismissal. As evidence that Butterfield participated in the conspiracy to conceal his unlawful discharge and prevent his reemployment, Fitzgerald relies heavily on communications between Butterfield and Haldeman in December 1969 and January 1970. After the President had promised at a press conference to inquire into Fitzgerald's dismissal, Haldeman solicited Butterfield's recommendations. In a subsequent memorandum emphasizing the importance of "loyalty," Butterfield counselled against offering Fitzgerald another job in the Administration at that time.⁸

For his part, Butterfield denies that he was involved in any decision concerning Fitzgerald's employment status until Haldeman sought his advice in December 1969—more than a month after Fitzgerald's termination had been scheduled and announced publicly by the Air Force. Butterfield states that he never communicated his views about Fitzgerald to any official of the Defense Department. He argues generally that nearly eight years of discovery have failed to turn up any evidence that he caused injury to Fitzgerald.⁹

Together with their codefendant Richard Nixon, petitioners Harlow and Butterfield moved for summary judgment on February 12, 1980. In denying the motion the District Court upheld the legal sufficiency of Fitzgerald's *Bivens* claim under the First Amendment and his "inferred" statu-

Coalition and, while there, revealed his intentions to a labor representative who, fortunately for us, was unsympathetic." *Ibid.*

⁸ App. 99-100, 180-181. This memorandum was not sent to the Defense Department.

⁹ See Memorandum in Support of Summary Judgment, *supra*, at 26. The history of Fitzgerald's litigation is recounted in *Nixon v. Fitzgerald*, *ante*. Butterfield was named as a defendant in the initial civil action filed by Fitzgerald in 1974. Harlow was named for the first time in respondent's Second Amended Complaint of July 5, 1978.

tory causes of action under 5 U. S. C. § 7211 and 18 U. S. C. § 1505.¹⁰ The court found that genuine issues of disputed fact remained for resolution at trial. It also ruled that petitioners were not entitled to absolute immunity. Pet. App. 1-3.

Independently of former President Nixon, petitioners invoked the collateral order doctrine and appealed the denial of their immunity defense to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed the appeal without opinion. Pet. App. 11-12. Never having determined the immunity available to the senior aides and advisers of the President of the United States, we granted certiorari. 452 U. S. 957 (1981).¹¹

II

As we reiterated today in *Nixon v. Fitzgerald*, *ante*, our decisions consistently have held that government officials are

¹⁰ The first of these statutes, 5 U. S. C. § 7211 (Supp. III 1979), provides generally that "The right of employees . . . to . . . furnish information to either House of Congress, or to a committee or a Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. Neither expressly creates a private right to sue for damages. Petitioners argue that the District Court erred in finding that a private cause of action could be inferred under either statute, and that "special factors" present in the context of the federal employer-employee relationship preclude the recognition of respondent's *Bivens* action under the First Amendment. The legal sufficiency of respondent's asserted causes of action is not, however, a question that we view as properly presented for our decision in the present posture of this case. See note 35, *infra*.

¹¹ As in *Nixon v. Fitzgerald*, *ante*, our jurisdiction has been challenged on the basis that the District Court's order denying petitioners' claim of absolute immunity was not an appealable final order and that the Court of Appeals' dismissal of petitioners' appeal establishes that this case was never "in" the Court of Appeals within the meaning of 28 U. S. C. § 1254. As the discussion in *Nixon* establishes our jurisdiction in this case as well, we need not consider those challenges in this opinion.

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." The absolute immunity of legislators, in their legislative functions, see, e. g., *Eastland v. United States Servicemen's Fund*, 421 U. S. 491 (1975), and of judges, in their judicial functions, see, e. g., *Stump v. Sparkman*, 435 U. S. 349 (1978), now is well settled. Our decisions also have extended absolute immunity to certain officials of the Executive Branch. These include prosecutors and similar officials, see *Butz v. Economou*, 438 U. S. 478, 508-512 (1978), executive officers engaged in adjudicative functions, *id.*, at 513-517, and the President of the United States, see *Nixon v. Fitzgerald*, *ante*.

For executive officials in general, however, our cases make plain that qualified immunity represents the norm. In *Scheuer v. Rhodes*, 416 U. S. 232 (1974), we acknowledged that high officials require greater protection than those with less complex discretionary responsibilities. Nonetheless, we held that a governor and his aides could receive the requisite protection from qualified or good-faith immunity. *Id.*, at 247-248. In *Butz v. Economou*, *supra*, we extended the approach of *Scheuer* to high federal officials of the Executive Branch. Discussing in detail the considerations that also had underlain our decision in *Scheuer*, we explained that the recognition of a qualified immunity defense for high executives reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, 438 U. S., at 504-505, but also "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Id.*, at 506. Without discounting the

adverse consequences of denying high officials an absolute immunity from private lawsuits alleging constitutional violations—consequences found sufficient in *Spalding v. Vilas*, 161 U. S. 483 (1896), and *Barr v. Matteo*, 360 U. S. 564 (1959), to warrant extension to such officials of absolute immunity from suits at common law—we emphasized our expectation that insubstantial suits need not proceed to trial:

“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 *Scheur* 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.” 438 U. S., at 507-508 (citations omitted).

Butz continued to acknowledge that the special functions of some officials might require absolute immunity. But the Court held that “federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.” *Id.*, at 506. This we reaffirmed today in *Nixon v. Fitzgerald*, *ante*, at —.

III

A

Petitioners argue that public policy requires a blanket recognition of absolute immunity for Presidential aides. In deciding this claim we do not write on an empty page. In *Butz v. Economou*, *supra*, the Secretary of Agriculture—a Cabi-

net official directly accountable to the President—asserted a defense of absolute official immunity from suit for civil damages. We rejected his claim. In so doing we did not question the power or the importance of the Secretary's office. Nor did we doubt the importance to the President of loyal and efficient subordinates in executing his duties of office. Yet we found these factors, alone, to be insufficient to justify absolute immunity. "[T]he greater power of [high] officials," we reasoned, "affords a greater potential for a regime of lawless conduct." 438 U. S., at 506. Damages actions against high officials were therefore "an important means of vindicating constitutional guarantees." *Ibid.* Moreover, we concluded that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under §1983 and suits brought directly under the Constitution against federal officials." *Id.*, at 504.

Having decided in *Butz* 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.

B

In disputing the controlling authority of *Butz*, petitioners rely on the principles developed in *Gravel v. United States*, 408 U. S. 606 (1972).¹² In *Gravel* we endorsed the view that

¹²Petitioners also claim support from other cases that have followed *Gravel* in holding that Congressional employees are derivatively entitled to

"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. . . ." *Id.*, at 616-617. 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. *Id.*, at 621-622.

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 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 itself¹³—be absolutely immune. Yet we implicitly rejected such derivative immunity in *Butz*.¹⁴ Moreover, in general our cases have followed a

the legislative immunity provided to United States Senators and Representatives under the Speech and Debate Clause. See *Eastland v. United States Servicemen's Fund*, 421 U. S. 491 (1975); *Doe v. McMillan*, 412 U. S. 306 (1973).

¹³See U. S. Const., Art. 2, §2 ("The President . . . may require the Opinion, in writing, or the principal Officer in each of the executive Departments, upon any Subject relating to the duties of their respective Offices. . . .").

¹⁴THE CHIEF JUSTICE, *post*, at 7, argues that senior Presidential aides work "more intimately on a daily basis [with the President] than does a Cabinet officer," and that *Butz* therefore is not controlling. In recent

"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. In *Gravel*, for example, we emphasized that Senators and their aides were absolutely immune only when performing "acts legislative in nature," and not when taking other acts even "in their official capacity." 408 U. S., at 625. See *Hutchinson v. Proxmire*, 443 U. S. 111, 125-133 (1979). Our cases involving judges¹⁵ and prosecutors¹⁶ have followed a similar line. The undifferentiated extension of absolute "derivative" immunity 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.¹⁷

years, however, such men as Henry Kissinger and James Schlesinger have served in both Presidential advisory and Cabinet positions. Kissinger held both posts simultaneously. 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.

¹⁵ See, e. g., *Supreme Court of Virginia v. Virginia Consumers Union*, 446 U. S. 719, 731-737 (1980); *Stump v. Sparkman*, *supra*, 438 U. S., at 362.

¹⁶ In *Imbler v. Pachtman*, 424 U. S. 409, 420-431 (1973), this Court reserved the question whether absolute immunity would extend to "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer." Since that time the courts of appeals generally have ruled prosecutors do not enjoy absolute immunity for acts taken in those capacities. See, e. g., *Mancini v. Lester*, 630 F. 2d 990, 992 (CA3 1980); *Forsyth v. Kleindeinst*, 599 F. 2d 1203, 1213-1214 (CA3 1979). This Court at least implicitly has drawn the same distinction in extending absolute immunity to executive officials when they are engaged in quasi-prosecutorial functions. See *Butz v. Economou*, *supra*, 438 U. S., at 515-517.

¹⁷ Our decision today in *Nixon v. Fitzgerald*, *ante*, in no way abrogates this general rule. As we explained in that opinion, the recognition of absolute immunity for all of a President's acts in office derives in principal part

C

Petitioners also assert an entitlement to immunity based on the "special functions" of White House aides. This form of argument accords with the analytical approach of our cases. 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.¹⁶ But a "special functions" rationale does not warrant a blanket recognition of absolute immunity for all Presidential aides in the performance of all their duties. This conclusion too follows from our decision in *Butz*, which establishes that an executive official's claim to absolute immunity must be justified by reference to the public interest in the special functions of his office, not the mere fact of high station.¹⁷

from factors unique to his constitutional station. Suits against other officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself.

¹⁶*Cf. United States v. Nixon*, 418 U. S. 688, 710-711 (1974) ("[C]ourts have traditionally shown the utmost deference to Presidential responsibilities" for foreign policy and military affairs, and claims of privilege in this area would receive a higher degree of deference than invocations of "a President's generalized interest in confidentiality."); *Katz v. United States*, 389 U. S. 347, 364 (1967) (WHITE, J., concurring) ("We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.") (emphasis added).

¹⁷*Gravel, supra*, points to a similar conclusion. We fairly may assume that some aides are assigned to act as Presidential "alter egos." *Gravel, supra*, 408 U. S., at 616-617, in the exercise of functions for which absolute immunity is "essential for the conduct of the public business," *Butz, supra*, 438 U. S., at 507. *Cf. Gravel, supra*, 408 U. S., at 620 (derivative immunity extends only to acts within the "central role" of the Speech and Debate Clause in permitting free legislative speech and debate). By analogy to *Gravel*, a derivative claim to Presidential immunity would be strongest in

Butz also identifies the location of the burden of proof. The burden of justifying absolute immunity rests on the official asserting the claim. 438 U. S., at 506. We have not of course had occasion to identify how a Presidential aide might carry this burden. But the general requisites are familiar in our cases. 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.²⁰ He then must demonstrate that he was discharging the protected function when performing the act for which liability is asserted.²¹

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." *Butz, supra*, 438 U. S., at 506. 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. We do not, however, foreclose the possibility that petitioners, on remand, could satisfy the standards properly applicable to their claims.

such "central" Presidential domains as foreign policy and national security, in which the President could not discharge his singularly vital mandate without delegating functions nearly as sensitive as his own.

²⁰ Here as elsewhere the relevant judicial inquiries would encompass considerations of public policy, the importance of which should be confirmed either by reference to the common law or, more likely, our constitutional heritage and structure. See *Nixon v. Fitzgerald, ante*, at —.

²¹ The need for such an inquiry is implicit in *Butz v. Economou, supra*, 438 U. S., at 508-517; see *Imbler v. Pachtman*, 424 U. S. 409, 430-431 (1976). Cases involving immunity under the Speech and Debate Clause have inquired explicitly into whether particular acts and activities qualified for the protection of the Clause. See, e. g., *Hutchinson v. Proxmire, supra*; *Doe v. McMillan*, 412 U. S. 306 (1973); *Gravel v. United States, supra*.

IV

Even if they cannot establish that their official functions require absolute immunity, petitioners assert that public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial. We agree.

A

As we recognized today in *Nixon v. Fitzgerald*, ante, at —, 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. *Butz v. Economou*, supra, 438 U. S., at 506; see *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 410 (1971) ("For people in Bivens' shoes, it is damages or nothing."). It is this recognition that has required the denial of absolute immunity to most public officers. 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 the society as a whole.²² These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from the acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177, F. 2d 579, 581 (CA2 1949), cert. denied, 339 U. S. 949 (1950).

In identifying qualified immunity as the best attainable ac-

²² See generally Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup. Ct. Rev. 281, 324-327.

commodation of competing values, in *Butz, supra*, 438 U. S., at 507-508, as in *Scheuer, supra*, 416 U. S., at 245-248, we relied on the assumption that this standard would permit "[i]nsubstantial lawsuits [to] be quickly terminated." *Butz, supra*, 438 U. S., at 507-508; see *Hanrahan v. Hampton*, 446 U. S. 754, 765 (POWELL, J., concurring in part and dissenting in part).²³ Yet petitioners advance persuasive arguments that the dismissal of insubstantial lawsuits without trial—a factor presupposed in the balance of competing interests struck by our prior cases—requires an adjustment of the "good faith" standard established by our decisions.

B

Qualified or "good faith" immunity is an affirmative defense that must be pleaded by a defendant official. *Gomez v. Toledo*, 446 U. S. 635 (1980).²⁴ 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." *Wood v. Strickland*, 420 U. S. 308, 320 (1975). The subjective component refers to "permissible intentions." *Ibid.* Characteristically the Court has defined these elements by identifying the circum-

²³ The importance of this consideration hardly needs emphasis. This Court has noted the risk imposed upon political officials who must defend their actions and motives before a jury. See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U. S. 391, 406 (1979); *Tenney v. Brandhove*, 341 U. S. 367, 377-378 (1951). As the Court observed in *Tenney*, "In times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed." 341 U. S., at 378.

²⁴ Although *Gomez* presented the question in the context of an action under § 1983, the Court's analysis indicates that "immunity" must also be pleaded as a defense in actions under the Constitution and laws of the United States. See 446 U. S., at 640. *Gomez* did not decide which party bore the burden of proof on the issue of good faith. *Id.*, at 642 (REHNQUIST, J., concurring).

stances in which qualified immunity would *not* be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if 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. . . ." *Id.*, at 321-322 (emphasis added).²⁶

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.²⁷ And an official's subjective good faith

²⁶ In *Wood* the Court explicitly limited its holding to the circumstances in which a school board member, "in the specific context of school discipline," 420 U. S., at 321, would be stripped of claimed immunity in an action under § 1983. Subsequent cases, however, have quoted the *Wood* formulation as a general statement of the qualified immunity standard. See, e. g., *Procunier v. Navarette*, 434 U. S. 565, 562-563, 566 (1978), quoted in *Baker v. McCollan*, 443 U. S. 137, 139 (1979). The two-pronged standard as phrased in *Wood* actually is somewhat redundant in many if not in most cases. If the defendant neither knew nor should have known that his conduct would violate the plaintiff's constitutional rights, it follows that the defendant could not have acted with a malicious intent to cause a deprivation of constitutional rights of which he knew nothing. The subjective standard thus would be meaningful only in a case in which a defendant acted without knowing that his conduct violated the Constitution, but intending to inflict "other [actionable] injury."

²⁷ The Rule states that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether summary judgment is proper, a court ordinarily must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party. E. g., *Poller v. Columbia Broadcast-*

has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.²⁷

In the context of *Butz's* attempted balancing of competing values, it is now 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.²⁸ Inquiries of this kind can be peculiarly disruptive of effective government.²⁹

ing System, Inc., 368 U. S. 464, 473 (1962).

²⁷ *E. g.*, *Landrum v. Moats*, 576 F. 2d 1320, 1329 (CA8 1978); *Duchene v. Sugarman*, 566 F. 2d 817, 832-833 (CA2 1977); cf. *Hutchinson v. Proxmire*, 433 U. S. 111, 120, n. 9 (1979) (questioning whether the existence of "actual malice," as an issue of fact, may properly be decided on summary judgment in a suit alleging libel of a public figure).

²⁸ In suits against a President's closest aides, discovery of this kind frequently could implicate separation-of-powers concerns. As the Court recognized in *United States v. Nixon*, 418 U. S. 683, 708 (1974):

"A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are considerations justifying a presumptive privilege for Presidential communications.

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. *Procunier v. Navarette*, 434 U. S. 555, 565, (1978); *Wood v. Strickland*, *supra*, 420 U. S., at 321.³⁰ Absent a clear congressional deci-

The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."

³⁰ As Judge Gesell observed in his concurring opinion in *Kirsinger v. Halperin*, 606 F. 2d 1192, 1214 (CA DC 1979), *aff'd* by an equally divided vote, 452 U. S. 713 (1981):

"We should not close our eyes to the fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials based on alleged constitutional torts. Each such suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discovery (*sic*) is wide-ranging, time-consuming, and not without considerable cost to the officials involved. It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient [to force a trial] The effect of this development upon the willingness of individuals to serve their country is obvious."

³¹ This case involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under § 1983. We have found previously, however, that "it would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitu-

sion to the contrary, we conclude that public policy will not support the cost of conditioning their immunity on proof of subjective intent.

Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law,³¹ should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine what the law was at the time the action occurred and in most cases what a reasonable person could have been expected to know about it.³² Until this threshold immunity question is resolved, extensive discovery generally should not be allowed.

By defining the limits of qualified immunity solely 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 ~~is~~ that ~~his~~ conduct ~~will~~ violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such knowing conduct may have a cause of action.³³ But where an official's

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tion against federal officials." *Butz v. Economou*, 438 U. S., at 504.

Our decision in no way diminishes the absolute immunity currently available to officials whose functions have been held to require a protection of this scope.

³¹ This case involves no claim that Congress has expressed its intent to impose "no fault" tort liability on high federal officials for violations of particular statutes or the Constitution.

³² As in *Procunier v. Navarette*, 434 U. S. 555, 565 (1978), we need not define here the circumstances under which "the state of the law" should be "evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court."

³³ Cf. *Procunier v. Navarette*, *supra*, 434 U. S., at 565 (footnote omitted) ("Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for established law that their conduct 'cannot reason-

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." *Pierson v. Ray*, 386 U. S. 547, 554 (1967).³⁴

C

In this case petitioners have asked us to hold that the respondent's pre-trial showings were insufficient to survive their motion for summary judgment.³⁵ We think it appropriate, however, to remand the case to the District Court, for its reconsideration of this issue in light of this opinion.³⁶ The

ably be characterized as being in good faith.'")

³⁴ We emphasize that our decision applies only to suits for civil damages arising from actions within the scope of an official's duties and in "objective" good faith. We express no view as to the conditions in which injunctive or declaratory relief might be available.

³⁵ In *Butz*, we admonished that "insubstantial" suits against high public officials should not be allowed to proceed to trial. 438 U. S., at 438. See *Schuck, supra*, 1980 Sup. Ct. Rev., at 324-327. We reiterate this admonition. Insubstantial lawsuits undermine the effectiveness of Government as contemplated by our constitutional structure, and "firm application of the Federal Rules of Civil Procedure" is fully warranted in such cases. *Id.*, at 508.

³⁶ Petitioners also have urged us, prior to the remand, to rule on the legal sufficiency of respondent's "implied" causes of action under 5 U. S. C. § 7211 and 18 U. S. C. § 1505 and his *Bivens* claim under the First Amendment. We do not view petitioners' argument on the statutory question as insubstantial. Cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, — U. S. —, — (1982) (controlling question in implication of statutory causes of action is whether Congress affirmatively intended to create a damages remedy); *Middlesex County Sewerage Auth. v. National Sea Clammers Assn.*, 453 U. S. 1, (1981) (same) *Texas Industries, Inc. v. Radcliff Materials*, 451 U. S. 630, 638-639 (1981) (same). Nor is the *Bivens* question. Cf. *Bush v. Lucas*, 647 F. 2d 573, 576 (CA5 1981), affirming on remand 598 F. 2d 958 (CA5 1979) (holding that the "unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a *Bivens* remedy"). As in *Nixon v. Fitzgerald*, *ante*, however, we took jurisdiction

trial court is more familiar with the record so far developed and also is better situated to make any such further findings as may be necessary.

V

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

So ordered.

of the case only to resolve the immunity question under the collateral order doctrine. We therefore think it appropriate to leave these questions for fuller consideration by the District Court and, if necessary, by the Court of Appeals.

Changes at 7, 10-13, 18

Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: **JUN 3 1982**

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS *v.* A. ERNEST FITZGERALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June —, 1982]

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.

I

In this suit for civil damages petitioners Bryce Harlow and Alexander Butterfield are alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the respondent A. Ernest Fitzgerald. Respondent avers that petitioners entered the conspiracy in their capacities as senior White House aides to former President Richard M. Nixon. As the alleged conspiracy is the same as that involved in *Nixon v. Fitzgerald*, *ante*, the facts need not be repeated in detail.

Respondent claims that Harlow joined the conspiracy in his role as the Presidential aide principally responsible for congressional relations.¹ At the conclusion of discovery the

¹ Harlow held this position from the beginning of the Nixon Administration on January 20, 1969 through November 4, 1969. On that date he was designated as Counsellor to the President, a position accorded Cabinet status. He served in that capacity until December 9, 1970, when he returned to private life. Harlow later resumed the duties of Counsellor for the pe-

supporting evidence remained inferential. As evidence of Harlow's conspiratorial activity respondent relies heavily on a series of conversations in which Harlow discussed Fitzgerald's dismissal with Air Force Secretary Robert Seamans.¹ The other evidence most supportive of Fitzgerald's claims consists in a recorded conversation in which the President later voiced a tentative recollection that Harlow was "all for canning" Fitzgerald.²

Disputing Fitzgerald's contentions, Harlow argues that exhaustive discovery has adduced no direct evidence of his in-

riod from July 1, 1973 through April 14, 1974. Respondent appears to allege that Harlow continued in a conspiracy against him throughout the various changes of official assignment.

¹The record reveals that Secretary Seamans called Harlow in May, 1969, to inquire about likely congressional reaction to a draft reorganization plan that would cause Fitzgerald's dismissal. According to Seamans' testimony, "we [the Air Force] didn't ask [Harlow] to pass judgment on the action itself. We just asked him what the impact would be in the relationship with the Congress." App. 153, 164-165 (Deposition of Robert Seamans). Through an aide Harlow responded that "this was a very sensitive item on the Hill and that it would be [his] recommendation that [the Air Force] not proceed to make such a change at that time." *Id.*, at 152. But the Air Force persisted. Seamans spoke to Harlow on at least one subsequent occasion during the spring of 1969. The record also establishes that Secretary Seamans called Harlow on November 4, 1969, shortly after the public announcement of Fitzgerald's impending dismissal, and again in December 1969. See App. 186.

²See App. 284. (Transcript of a Recorded Conversation between Richard Nixon and Ronald Ziegler, February 26, 1973). In a conversation with the President on January 31, 1973, John Ehrlichman also recalled that Harlow had discussed the Fitzgerald case with the President. See App. 218-221. (Transcript of Recorded Conversation between Richard Nixon and John Ehrlichman, January 31, 1973). In the same conversation the President himself asserted that he had spoken to Harlow about the Fitzgerald matter, see *id.*, at 218, but the parties continue to dispute whether Mr. Nixon—at the most relevant moments in the discussion—was confusing Fitzgerald's case with that of another dismissed employee. The President explicitly stated at one point that he previously had been confused. See *id.*, at 220.

volvement in any wrongful activity.⁴ Petitioner avers that Secretary Seamans advised him that considerations of efficiency required Fitzgerald's removal by a reduction in force, despite anticipated adverse congressional reaction. Harlow asserts he had no reason to believe that a conspiracy existed. He contends that he took all his actions in good faith.⁵

Petitioner Butterfield also is alleged to have entered the conspiracy not later than May 1969. Employed as Deputy Assistant to the President and Deputy Chief of Staff to H.R. Haldeman,⁶ Butterfield circulated a White House memorandum in that month in which he claimed to have learned that Fitzgerald planned to "blow the whistle" on some "shoddy purchasing practices" by exposing these practices to public view.⁷ Fitzgerald characterizes this memorandum as evi-

⁴ See Defendants Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment (Memorandum in Support of Summary Judgment), at 7 (Civil No. 74-178, Feb. 12, 1980).

⁵ In support of his version of events Harlow relies particularly on the deposition testimony of Air Force Secretary Seamans, who stated that he regarded abolition of Fitzgerald's position as necessary "to improve the efficiency" of the Financial Management Office of the Air Force and that he never received any White House instruction regarding the Fitzgerald case. App. 159-160. Petitioner also disputes the probative value of Richard Nixon's recorded remark that Harlow had supported Fitzgerald's firing. Harlow emphasizes the tentativeness of the President's statement. To the President's query whether Harlow was "all for canning [Fitzgerald], wasn't he?", White House Press Secretary Ronald Ziegler in fact gave a negative reply: "No, I think Bryce may have been the other way." App. 284. The President did not respond to Ziegler's comment.

⁶ The record establishes that Butterfield worked from an office immediately adjacent to the oval office. He had almost daily contact with the President until March 1973, when he left the White House to become Administrator of the Federal Aviation Administration.

⁷ App. 274. Butterfield reported that this information had been referred to the Federal Bureau of Investigation. In the memorandum Butterfield reported that he had received the information "by word of several mouths, but allegedly from a senior AFL-CIO official originally. . . . Evidently, Fitzgerald attended a recent meeting of the National Democratic

dence that Butterfield had commenced efforts to secure Fitzgerald's retaliatory dismissal. As evidence that Butterfield participated in the conspiracy to conceal his unlawful discharge and prevent his reemployment, Fitzgerald relies heavily on communications between Butterfield and Haldeman in December 1969 and January 1970. After the President had promised at a press conference to inquire into Fitzgerald's dismissal, Haldeman solicited Butterfield's recommendations. In a subsequent memorandum emphasizing the importance of "loyalty," Butterfield counselled against offering Fitzgerald another job in the Administration at that time.⁸

For his part, Butterfield denies that he was involved in any decision concerning Fitzgerald's employment status until Haldeman sought his advice in December 1969—more than a month after Fitzgerald's termination had been scheduled and announced publicly by the Air Force. Butterfield states that he never communicated his views about Fitzgerald to any official of the Defense Department. He argues generally that nearly eight years of discovery have failed to turn up any evidence that he caused injury to Fitzgerald.⁹

Together with their codefendant Richard Nixon, petitioners Harlow and Butterfield moved for summary judgment on February 12, 1980. In denying the motion the District Court upheld the legal sufficiency of Fitzgerald's *Bivens* claim under the First Amendment and his "inferred" statu-

Coalition and, while there, revealed his intentions to a labor representative who, fortunately for us, was unsympathetic." *Ibid.*

⁸ App. 99-100, 180-181. This memorandum was not sent to the Defense Department.

⁹ See Memorandum in Support of Summary Judgment, *supra*, at 26. The history of Fitzgerald's litigation is recounted in *Nixon v. Fitzgerald*, *ante*. Butterfield was named as a defendant in the initial civil action filed by Fitzgerald in 1974. Harlow was named for the first time in respondent's Second Amended Complaint of July 5, 1978.

tory causes of action under 5 U. S. C. § 7211 and 18 U. S. C. § 1505.¹⁰ The court found that genuine issues of disputed fact remained for resolution at trial. It also ruled that petitioners were not entitled to absolute immunity. Pet. App. 1-3.

Independently of former President Nixon, petitioners invoked the collateral order doctrine and appealed the denial of their immunity defense to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed the appeal without opinion. Pet. App. 11-12. Never having determined the immunity available to the senior aides and advisers of the President of the United States, we granted certiorari. 452 U. S. 957 (1981).¹¹

II

As we reiterated today in *Nixon v. Fitzgerald*, *ante*, our decisions consistently have held that government officials are

¹⁰ The first of these statutes, 5 U. S. C. § 7211 (Supp. III 1979), provides generally that "The right of employees . . . to . . . furnish information to either House of Congress, or to a committee or a Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. Neither expressly creates a private right to sue for damages. Petitioners argue that the District Court erred in finding that a private cause of action could be inferred under either statute, and that "special factors" present in the context of the federal employer-employee relationship preclude the recognition of respondent's *Bivens* action under the First Amendment. The legal sufficiency of respondent's asserted causes of action is not, however, a question that we view as properly presented for our decision in the present posture of this case. See note 35, *infra*.

¹¹ As in *Nixon v. Fitzgerald*, *ante*, our jurisdiction has been challenged on the basis that the District Court's order denying petitioners' claim of absolute immunity was not an appealable final order and that the Court of Appeals' dismissal of petitioners' appeal establishes that this case was never "in" the Court of Appeals within the meaning of 28 U. S. C. § 1254. As the discussion in *Nixon* establishes our jurisdiction in this case as well, we need not consider those challenges in this opinion.

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." The absolute immunity of legislators, in their legislative functions, see, e. g., *Eastland v. United States Servicemen's Fund*, 421 U. S. 491 (1975), and of judges, in their judicial functions, see, e. g., *Stump v. Sparkman*, 435 U. S. 349 (1978), now is well settled. Our decisions also have extended absolute immunity to certain officials of the Executive Branch. These include prosecutors and similar officials, see *Butz v. Economou*, 438 U. S. 478, 508-512 (1978), executive officers engaged in adjudicative functions, *id.*, at 513-517, and the President of the United States, see *Nixon v. Fitzgerald*, *ante*.

For executive officials in general, however, our cases make plain that qualified immunity represents the norm. In *Scheuer v. Rhodes*, 416 U. S. 232 (1974), we acknowledged that high officials require greater protection than those with less complex discretionary responsibilities. Nonetheless, we held that a governor and his aides could receive the requisite protection from qualified or good-faith immunity. *Id.*, at 247-248. In *Butz v. Economou*, *supra*, we extended the approach of *Scheuer* to high federal officials of the Executive Branch. Discussing in detail the considerations that also had underlain our decision in *Scheuer*, we explained that the recognition of a qualified immunity defense for high executives reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, 438 U. S., at 504-505, but also "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Id.*, at 506. Without discounting the

adverse consequences of denying high officials an absolute immunity from private lawsuits alleging constitutional violations—consequences found sufficient in *Spalding v. Vilas*, 161 U. S. 483 (1896), and *Barr v. Matteo*, 360 U. S. 564 (1959), to warrant extension to such officials of absolute immunity from suits at common law—we emphasized our expectation that insubstantial suits need not proceed to trial:

“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 *Scheur* 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.” 438 U. S., at 507–508 (citations omitted).

Butz continued to acknowledge that the special functions of some officials might require absolute immunity. But the Court held that “federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.” *Id.*, at 506. This we reaffirmed today in *Nixon v. Fitzgerald*, *ante*, at —.

III

Petitioners argue that they are entitled to a blanket protection of absolute immunity as an incident of their offices as Presidential aides. In deciding this claim we do not write on an empty page. In *Butz v. Economou*, *supra*, the Secretary of Agriculture—a Cabinet official directly accountable to the

President—asserted a defense of absolute official immunity from suit for civil damages. We rejected his claim. In so doing we did not question the power or the importance of the Secretary's office. Nor did we doubt the importance to the President of loyal and efficient subordinates in executing his duties of office. Yet we found these factors, alone, to be insufficient to justify absolute immunity. "[T]he greater power of [high] officials," we reasoned, "affords a greater potential for a regime of lawless conduct." 438 U. S., at 506. Damages actions against high officials were therefore "an important means of vindicating constitutional guarantees." *Ibid.* Moreover, we concluded that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Id.*, at 504.

Having decided in *Butz* 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.

B

In disputing the controlling authority of *Butz*, petitioners rely on the principles developed in *Gravel v. United States*, 408 U. S. 606 (1972).² In *Gravel* we endorsed the view that

² Petitioners also claim support from other cases that have followed *Gravel* in holding that Congressional employees are derivatively entitled to

"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. . . ." *Id.*, at 616-617. 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. *Id.*, at 621-622.

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 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 itself¹³—be absolutely immune. Yet we implicitly rejected such derivative immunity in *Butz*.¹⁴ Moreover, in general our cases have followed a

the legislative immunity provided to United States Senators and Representatives under the Speech and Debate Clause. See *Eastland v. United States Servicemen's Fund*, 421 U. S. 491 (1975); *Doe v. McMillan*, 412 U. S. 306 (1973).

¹³ See U. S. Const., Art. 2, § 2 ("The President . . . may require the Opinion, in writing, or the principal Officer in each of the executive Departments, upon any Subject relating to the duties of their respective Offices. . . .").

¹⁴ THE CHIEF JUSTICE, *post*, at 7, argues that senior Presidential aides work "more intimately on a daily basis [with the President] than does a Cabinet officer," and that *Butz* therefore is not controlling. In recent

"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. In *Gravel*, for example, we emphasized that Senators and their aides were absolutely immune only when performing "acts legislative in nature," and not when taking other acts even "in their official capacity." 408 U. S., at 625. See *Hutchinson v. Proxmire*, 443 U. S. 111, 125-133 (1979). Our cases involving judges¹⁶ and prosecutors¹⁶ have followed a similar line. The undifferentiated extension of absolute "derivative" immunity 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.¹⁷

years, however, such men as Henry Kissinger and James Schlesinger have served in both Presidential advisory and Cabinet positions. Kissinger held both posts simultaneously. 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. *Butz v. Economou* cannot be distinguished on this basis.

¹⁶ See, e. g., *Supreme Court of Virginia v. Virginia Consumers Union*, 446 U. S. 719, 731-737 (1980); *Stump v. Sparkman*, *supra*, 438 U. S., at 362.

¹⁷ In *Imbler v. Pachtman*, 424 U. S. 409, 430-431 (1973), this Court reserved the question whether absolute immunity would extend to "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer." Since that time the courts of appeals generally have ruled prosecutors do not enjoy absolute immunity for acts taken in those capacities. See, e. g., *Mancini v. Lester*, 680 F. 2d 990, 992 (CA3 1980); *Forsyth v. Kleindeinst*, 599 F. 2d 1203, 1213-1214 (CA8 1979). This Court at least implicitly has drawn the same distinction in extending absolute immunity to executive officials when they are engaged in quasi-prosecutorial functions. See *Butz v. Economou*, *supra*, 438 U. S., at 515-517.

¹⁸ Our decision today in *Nixon v. Fitzgerald*, *ante*, in no way abrogates this general rule. As we explained in that opinion, the recognition of absolute immunity for all of a President's acts in office derives in principal part

C

Petitioners also assert an entitlement to immunity based on the "special functions" of White House aides. This form of argument accords with the analytical approach of our cases. 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.¹⁸ But a "special functions" rationale does not warrant a blanket recognition of absolute immunity for all Presidential aides in the performance of all their duties. This conclusion too follows from our decision in *Butz*, which establishes that an executive official's claim to absolute immunity must be justified by reference to the public interest in the special functions of his office, not the mere fact of high station.¹⁹

from factors unique to his constitutional responsibilities and station. Suits against other officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself.

"*Cf. United States v. Nixon*, 418 U. S. 683, 710-711 (1974) ("[C]ourts have traditionally shown the utmost deference to Presidential responsibilities" for foreign policy and military affairs, and claims of privilege in this area would receive a higher degree of deference than invocations of "a President's generalized interest in confidentiality."); *Katz v. United States*, 389 U. S. 347, 364 (1967) (WHITE, J., concurring) ("We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.") (emphasis added).

"*Gravel, supra*, points to a similar conclusion. We fairly may assume that some aides are assigned to act as Presidential "alter egos," *Gravel, supra*, 408 U. S., at 616-617, in the exercise of functions for which absolute immunity is "essential for the conduct of the public business," *Butz, supra*, 438 U. S., at 507. *Cf. Gravel, supra*, 408 U. S., at 620 (derivative immunity extends only to acts within the "central role" of the Speech and Debate Clause in permitting free legislative speech and debate). By analogy to *Gravel*, a derivative claim to Presidential immunity would be strongest in

Butz also identifies the location of the burden of proof. The burden of justifying absolute immunity rests on the official asserting the claim. 438 U. S., at 506. We have not of course had occasion to identify how a Presidential aide might carry this burden. But the general requisites are familiar in our cases. 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.²¹ He then must demonstrate that he was discharging the protected function when performing the act for which liability is asserted.²²

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." *Butz, supra*, at 506. 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. We do not, however, foreclose the possibility that petitioners, on remand, could satisfy the standards properly applicable to their claims.

such "central" Presidential domains as foreign policy and national security, in which the President could not discharge his singularly vital mandate without delegating functions nearly as sensitive as his own.

²¹ Here as elsewhere the relevant judicial inquiries would encompass considerations of public policy, the importance of which should be confirmed either by reference to the common law or, more likely, our constitutional heritage and structure. See *Nixon v. Fitzgerald, ante*, at —.

²² The need for such an inquiry is implicit in *Butz v. Economou, supra*, 438 U. S., at 508-517; see *Imbler v. Pachtman*, 424 U. S. 409, 430-431 (1976). Cases involving immunity under the Speech and Debate Clause have inquired explicitly into whether particular acts and activities qualified for the protection of the Clause. See, e. g., *Hutchinson v. Proxmire, supra*; *Doe v. McMillan*, 412 U. S. 306 (1973); *Gravel v. United States, supra*.

IV

Even if they cannot establish that their official functions require absolute immunity, petitioners assert that public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial. We agree.

A

As we recognized today in *Nixon v. Fitzgerald*, ante, at —, 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. *Butz v. Economou*, 438 U. S., at 506; see *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 410 (1971) ("For people in Bivens' shoes, it is damages or nothing."). It is this recognition that has required the denial of absolute immunity to most public officers. 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 the society as a whole.²² These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from the acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177, F. 2d 579, 581 (CA2 1949), cert. denied, 339 U. S. 949 (1950).

In identifying qualified immunity as the best attainable ac-

²² See generally Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup. Ct. Rev. 281, 324-327.

commodation of competing values, in *Butz*, *supra*, at 507-508, as in *Scheuer*, 416 U. S., at 245-248, we relied on the assumption that this standard would permit "[i]nsubstantial lawsuits [to] be quickly terminated." 438 U. S., at 507-508; see *Hanrahan v. Hampton*, 446 U. S. 754, 765 (POWELL, J., concurring in part and dissenting in part).²³ Yet petitioners advance persuasive arguments that the dismissal of insubstantial lawsuits without trial—a factor presupposed in the balance of competing interests struck by our prior cases—requires an adjustment of the "good faith" standard established by our decisions.

B

Qualified or "good faith" immunity is an affirmative defense that must be pleaded by a defendant official. *Gomez v. Toledo*, 446 U. S. 635 (1980).²⁴ 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." *Wood v. Strickland*, 420 U. S. 308, 320 (1975). The subjective component refers to "permissible intentions." *Ibid.* Characteristically the Court has defined these elements by identifying the circum-

²³The importance of this consideration hardly needs emphasis. This Court has noted the risk imposed upon political officials who must defend their actions and motives before a jury. See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U. S. 391, 405 (1979); *Tenney v. Brandhove*, 341 U. S. 367, 377-378 (1961). As the Court observed in *Tenney*, "In times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed." 341 U. S., at 378.

²⁴Although *Gomez* presented the question in the context of an action under § 1983, the Court's analysis indicates that "immunity" must also be pleaded as a defense in actions under the Constitution and laws of the United States. See 446 U. S., at 640. *Gomez* did not decide which party bore the burden of proof on the issue of good faith. *Id.*, at 642 (REHNQUIST, J., concurring).

stances in which qualified immunity would *not* be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if 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. . . ." *Id.*, at 321-322 (emphasis added).²⁵

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.²⁶ 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.²⁷

²⁵ In *Wood* the Court explicitly limited its holding to the circumstances in which a school board member, "in the specific context of school discipline," 420 U. S., at 321, would be stripped of claimed immunity in an action under § 1983. Subsequent cases, however, have quoted the *Wood* formulation as a general statement of the qualified immunity standard. See, e. g., *Procunier v. Navarette*, 434 U. S. 555, 562-563, 566 (1978), quoted in *Baker v. McCollan*, 443 U. S. 137, 139 (1979).

²⁶ The Rule states that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether summary judgment is proper, a court ordinarily must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party. *E. g.*, *Polier v. Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962).

²⁷ *E. g.*, *Landrum v. Moats*, 576 F. 2d 1320, 1329 (CA8 1978); *Duchesne v. Sugarman*, 566 F. 2d 817, 832-833 (CA2 1977); cf. *Hutchinson v. Proxmire*, 433 U. S. 111, 120, n. 9 (1979) (questioning whether the existence of "actual malice," as an issue of fact, may properly be decided on summary

omission

In the context of *Butz's* attempted balancing of competing values, it is now 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.²⁵ Inquiries of this kind can be peculiarly disruptive of effective government.²⁶

judgment in a suit alleging libel of a public figure).

²⁵ In suits against a President’s closest aides, discovery of this kind frequently could implicate separation-of-powers concerns. As the Court recognized in *United States v. Nixon*, 418 U. S. 683, 708 (1974):

“A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.”

²⁶ As Judge Gesell observed in his concurring opinion in *Kissinger v. Halperin*, 606 F. 2d 1192, 1214 (CA DC 1979), *aff’d* by an equally divided vote, 452 U. S. 713 (1981):

“We should not close our eyes to the fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits

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. *Procunier v. Navarette*, 434 U. S. 555, 565, (1978); *Wood v. Strickland*, *supra*, 420 U. S., at 321.³⁰ Absent a clear congressional decision to the contrary, we conclude that public policy will not support the cost of conditioning their immunity on proof of

seeking damage awards against high government officials based on alleged constitutional torts. Each such suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discovery [*sic*] is wide-ranging, time-consuming, and not without considerable cost to the officials involved. It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient [to force a trial] The effect of this development upon the willingness of individuals to serve their country is obvious."

³⁰This case involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under § 1983. We have found previously, however, that "it would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Butz v. Economou*, 438 U. S., at 504.

Our decision in no way diminishes the absolute immunity currently available to officials whose functions have been held to require a protection of this scope.

subjective mental factors.

Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law,³¹ should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. [On summary judgment, the judge appropriately may determine what the law was at the time an action occurred and in most cases what a reasonable person could have been expected to know about it.³² Until this threshold immunity question is resolved, extensive discovery generally should not be allowed.]

By defining the limits of qualified immunity solely 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.³³ But where an official's duties legitimately require action in which clearly established rights are not implicated, the public

³¹ This case involves no claim that Congress has expressed its intent to impose "no fault" tort liability on high federal officials for violations of particular statutes or the Constitution.

³² As in *Procunier v. Navarette*, 434 U. S. 555, 565 (1978), we need not define here the circumstances under which "the state of the law" should be "evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court."

³³ Cf. *Procunier v. Navarette*, *supra*, 434 U. S., at 565 (footnote omitted) ("Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for established law that their conduct 'cannot reasonably be characterized as being in good faith.'")

B R W =
index

interest may be better served by action taken "with independence and without fear of consequences." *Pierson v. Ray*, 386 U. S. 547, 554 (1967).³⁴

C

In this case petitioners have asked us to hold that the respondent's pre-trial showings were insufficient to survive their motion for summary judgment.³⁵ We think it appropriate, however, to remand the case to the District Court, for its reconsideration of this issue in light of this opinion.³⁶ The

³⁴ We emphasize that our decision applies only to suits for civil damages arising from actions within the scope of an official's duties and in "objective" good faith. We express no view as to the conditions in which injunctive or declaratory relief might be available.

³⁵ In *Butz*, we admonished that "insubstantial" suits against high public officials should not be allowed to proceed to trial. 438 U. S., at 438. See *Schuck, supra*, 1980 Sup. Ct. Rev., at 324-327. We reiterate this admonition. Insubstantial lawsuits undermine the effectiveness of Government as contemplated by our constitutional structure, and "firm application of the Federal Rules of Civil Procedure" is fully warranted in such cases. *Id.*, at 508.

³⁶ Petitioners also have urged us, prior to the remand, to rule on the legal sufficiency of respondent's "implied" causes of action under 5 U. S. C. § 7211 and 18 U. S. C. § 1505 and his *Bivens* claim under the First Amendment. We do not view petitioners' argument on the statutory question as insubstantial. Cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, — U. S. —, — (1982) (controlling question in implication of statutory causes of action is whether Congress affirmatively intended to create a damages remedy); *Middlesex County Sewerage Auth. v. National Sea Clammers Assn.*, 453 U. S. 1, (1981) (same); *Texas Industries, Inc. v. Radcliff Materials*, 451 U. S. 630, 638-639 (1981) (same). Nor is the *Bivens* question. Cf. *Bush v. Lucas*, 647 F. 2d 573, 576 (CA5 1981), affirming on remand 598 F. 2d 958 (CA5 1979) (holding that the "unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a *Bivens* remedy"). As in *Nixon v. Fitzgerald, ante*, however, we took jurisdiction of the case only to resolve the immunity question under the collateral order doctrine. We therefore think it appropriate to leave these questions for

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trial court is more familiar with the record so far developed and also is better situated to make any such further findings as may be necessary.

V

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

So ordered.

fuller consideration by the District Court and, if necessary, by the Court of Appeals.

-P, 17, 18

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: _____

JAN 8 1982

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS *v.* A. ERNEST FITZGERALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June —, 1982]

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.

I

In this suit for civil damages petitioners Bryce Harlow and Alexander Butterfield are alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the respondent A. Ernest Fitzgerald. Respondent avers that petitioners entered the conspiracy in their capacities as senior White House aides to former President Richard M. Nixon. As the alleged conspiracy is the same as that involved in *Nixon v. Fitzgerald*, *ante*, the facts need not be repeated in detail.

Respondent claims that Harlow joined the conspiracy in his role as the Presidential aide principally responsible for congressional relations.¹ At the conclusion of discovery the

¹ Harlow held this position from the beginning of the Nixon Administration on January 20, 1969 through November 4, 1969. On that date he was designated as Counsellor to the President, a position accorded Cabinet status. He served in that capacity until December 9, 1970, when he returned to private life. Harlow later resumed the duties of Counsellor for the pe-

supporting evidence remained inferential. As evidence of Harlow's conspiratorial activity respondent relies heavily on a series of conversations in which Harlow discussed Fitzgerald's dismissal with Air Force Secretary Robert Seamans.² The other evidence most supportive of Fitzgerald's claims consists in a recorded conversation in which the President later voiced a tentative recollection that Harlow was "all for canning" Fitzgerald.³

Disputing Fitzgerald's contentions, Harlow argues that exhaustive discovery has adduced no direct evidence of his in-

riod from July 1, 1973 through April 14, 1974. Respondent appears to allege that Harlow continued in a conspiracy against him throughout the various changes of official assignment.

²The record reveals that Secretary Seamans called Harlow in May, 1969, to inquire about likely congressional reaction to a draft reorganization plan that would cause Fitzgerald's dismissal. According to Seamans' testimony, "we [the Air Force] didn't ask [Harlow] to pass judgment on the action itself. We just asked him what the impact would be in the relationship with the Congress." App. 153, 164-165 (Deposition of Robert Seamans). Through an aide Harlow responded that "this was a very sensitive item on the Hill and that it would be [his] recommendation that [the Air Force] not proceed to make such a change at that time." *Id.*, at 152. But the Air Force persisted. Seamans spoke to Harlow on at least one subsequent occasion during the spring of 1969. The record also establishes that Secretary Seamans called Harlow on November 4, 1969, shortly after the public announcement of Fitzgerald's impending dismissal, and again in December 1969. See App. 186.

³See App. 284. (Transcript of a Recorded Conversation between Richard Nixon and Ronald Ziegler, February 26, 1973). In a conversation with the President on January 31, 1973, John Ehrlichman also recalled that Harlow had discussed the Fitzgerald case with the President. See App. 218-221. (Transcript of Recorded Conversation between Richard Nixon and John Ehrlichman, January 31, 1973). In the same conversation the President himself asserted that he had spoken to Harlow about the Fitzgerald matter, see *id.*, at 218, but the parties continue to dispute whether Mr. Nixon—at the most relevant moments in the discussion—was confusing Fitzgerald's case with that of another dismissed employee. The President explicitly stated at one point that he previously had been confused. See *id.*, at 220.

v involvement in any wrongful activity.⁴ Petitioner avers that Secretary Seamans advised him that considerations of efficiency required Fitzgerald's removal by a reduction in force, despite anticipated adverse congressional reaction. Harlow asserts he had no reason to believe that a conspiracy existed. He contends that he took all his actions in good faith.⁵

Petitioner Butterfield also is alleged to have entered the conspiracy not later than May 1969. Employed as Deputy Assistant to the President and Deputy Chief of Staff to H.R. Haldeman,⁶ Butterfield circulated a White House memorandum in that month in which he claimed to have learned that Fitzgerald planned to "blow the whistle" on some "shoddy purchasing practices" by exposing these practices to public view.⁷ Fitzgerald characterizes this memorandum as evi-

⁴See Defendants Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment (Memorandum in Support of Summary Judgment), at 7 (Civil No. 74-178, Feb. 12, 1980).

⁵In support of his version of events Harlow relies particularly on the deposition testimony of Air Force Secretary Seamans, who stated that he regarded abolition of Fitzgerald's position as necessary "to improve the efficiency" of the Financial Management Office of the Air Force and that he never received any White House instruction regarding the Fitzgerald case. App. 159-160. Petitioner also disputes the probative value of Richard Nixon's recorded remark that Harlow had supported Fitzgerald's firing. Harlow emphasizes the tentativeness of the President's statement. To the President's query whether Harlow was "all for canning [Fitzgerald], wasn't he?", White House Press Secretary Ronald Ziegler in fact gave a negative reply: "No, I think Bryce may have been the other way." App. 284. The President did not respond to Ziegler's comment.

⁶The record establishes that Butterfield worked from an office immediately adjacent to the oval office. He had almost daily contact with the President until March 1973, when he left the White House to become Administrator of the Federal Aviation Administration.

⁷App. 274. Butterfield reported that this information had been referred to the Federal Bureau of Investigation. In the memorandum Butterfield reported that he had received the information "by word of several mouths, but allegedly from a senior AFL-CIO official originally Evidently, Fitzgerald attended a recent meeting of the National Democratic

dence that Butterfield had commenced efforts to secure Fitzgerald's retaliatory dismissal. As evidence that Butterfield participated in the conspiracy to conceal his unlawful discharge and prevent his reemployment, Fitzgerald relies heavily on communications between Butterfield and Haldeman in December 1969 and January 1970. After the President had promised at a press conference to inquire into Fitzgerald's dismissal, Haldeman solicited Butterfield's recommendations. In a subsequent memorandum emphasizing the importance of "loyalty," Butterfield counselled against offering Fitzgerald another job in the Administration at that time.⁵

For his part, Butterfield denies that he was involved in any decision concerning Fitzgerald's employment status until Haldeman sought his advice in December 1969—more than a month after Fitzgerald's termination had been scheduled and announced publicly by the Air Force. Butterfield states that he never communicated his views about Fitzgerald to any official of the Defense Department. He argues generally that nearly eight years of discovery have failed to turn up any evidence that he caused injury to Fitzgerald.⁶

Together with their codefendant Richard Nixon, petitioners Harlow and Butterfield moved for summary judgment on February 12, 1980. In denying the motion the District Court upheld the legal sufficiency of Fitzgerald's *Bivens* claim under the First Amendment and his "inferred" statu-

Coalition and, while there, revealed his intentions to a labor representative who, fortunately for us, was unsympathetic." *Ibid.*

⁵ App. 99-100, 180-181. This memorandum was not sent to the Defense Department.

⁶ See Memorandum in Support of Summary Judgment, *supra*, at 26. The history of Fitzgerald's litigation is recounted in *Nixon v. Fitzgerald*, *ante*. Butterfield was named as a defendant in the initial civil action filed by Fitzgerald in 1974. Harlow was named for the first time in respondent's Second Amended Complaint of July 5, 1978.

tory causes of action under 5 U. S. C. § 7211 and 18 U. S. C. § 1505.¹⁰ The court found that genuine issues of disputed fact remained for resolution at trial. It also ruled that petitioners were not entitled to absolute immunity. Pet. App. 1-3.

Independently of former President Nixon, petitioners invoked the collateral order doctrine and appealed the denial of their immunity defense to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed the appeal without opinion. Pet. App. 11-12. Never having determined the immunity available to the senior aides and advisers of the President of the United States, we granted certiorari. 452 U. S. 957 (1981).¹¹

II

As we reiterated today in *Nixon v. Fitzgerald*, *ante*, our decisions consistently have held that government officials are

¹⁰The first of these statutes, 5 U. S. C. § 7211 (Supp. III 1979), provides generally that "The right of employees . . . to . . . furnish information to either House of Congress, or to a committee or a Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. Neither expressly creates a private right to sue for damages. Petitioners argue that the District Court erred in finding that a private cause of action could be inferred under either statute, and that "special factors" present in the context of the federal employer-employee relationship preclude the recognition of respondent's *Bivens* action under the First Amendment. The legal sufficiency or respondent's asserted causes of action is not, however, a question that we view as properly presented for our decision in the present posture of this case. See note 35, *infra*.

¹¹As in *Nixon v. Fitzgerald*, *ante*, our jurisdiction has been challenged on the basis that the District Court's order denying petitioners' claim of absolute immunity was not an appealable final order and that the Court of Appeals' dismissal of petitioners' appeal establishes that this case was never "in" the Court of Appeals within the meaning of 28 U. S. C. § 1254. As the discussion in *Nixon* establishes our jurisdiction in this case as well, we need not consider those challenges in this opinion.

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." The absolute immunity of legislators, in their legislative functions, see, e. g., *Eastland v. United States Servicemen's Fund*, 421 U. S. 491 (1975), and of judges, in their judicial functions, see, e. g., *Stump v. Sparkman*, 435 U. S. 349 (1978), now is well settled. Our decisions also have extended absolute immunity to certain officials of the Executive Branch. These include prosecutors and similar officials, see *Butz v. Economou*, 438 U. S. 478, 508-512 (1978), executive officers engaged in adjudicative functions, *id.*, at 513-517, and the President of the United States, see *Nixon v. Fitzgerald*, *ante*.

For executive officials in general, however, our cases make plain that qualified immunity represents the norm. In *Scheuer v. Rhodes*, 416 U. S. 232 (1974), we acknowledged that high officials require greater protection than those with less complex discretionary responsibilities. Nonetheless, we held that a governor and his aides could receive the requisite protection from qualified or good-faith immunity. *Id.*, at 247-248. In *Butz v. Economou*, *supra*, we extended the approach of *Scheuer* to high federal officials of the Executive Branch. Discussing in detail the considerations that also had underlain our decision in *Scheuer*, we explained that the recognition of a qualified immunity defense for high executives reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, 438 U. S., at 504-505, but also "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Id.*, at 506. Without discounting the

adverse consequences of denying high officials an absolute immunity from private lawsuits alleging constitutional violations—consequences found sufficient in *Spalding v. Vilas*, 161 U. S. 483 (1896), and *Barr v. Matteo*, 360 U. S. 564 (1959), to warrant extension to such officials of absolute immunity from suits at common law—we emphasized our expectation that insubstantial suits need not proceed to trial:

"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 *Scheur* 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." 438 U. S., at 507-508 (citations omitted).

Butz continued to acknowledge that the special functions of some officials might require absolute immunity. But the Court held that "federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope." *Id.*, at 506. This we reaffirmed today in *Nixon v. Fitzgerald*, *ante*, at —.

III

Petitioners argue that they are entitled to a blanket protection of absolute immunity as an incident of their offices as Presidential aides. In deciding this claim we do not write on an empty page. In *Butz v. Economou*, *supra*, the Secretary of Agriculture—a Cabinet official directly accountable to the

President—asserted a defense of absolute official immunity from suit for civil damages. We rejected his claim. In so doing we did not question the power or the importance of the Secretary's office. Nor did we doubt the importance to the President of loyal and efficient subordinates in executing his duties of office. Yet we found these factors, alone, to be insufficient to justify absolute immunity. "[T]he greater power of [high] officials," we reasoned, "affords a greater potential for a regime of lawless conduct." 438 U. S., at 506. Damages actions against high officials were therefore "an important means of vindicating constitutional guarantees." *Ibid.* Moreover, we concluded that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under §1983 and suits brought directly under the Constitution against federal officials." *Id.*, at 504.

Having decided in *Butz* 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.

B

In disputing the controlling authority of *Butz*, petitioners rely on the principles developed in *Gravel v. United States*, 408 U. S. 606 (1972).¹² In *Gravel* we endorsed the view that

¹² Petitioners also claim support from other cases that have followed *Gravel* in holding that Congressional employees are derivatively entitled to

"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. . . ." *Id.*, at 616-617. 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. *Id.*, at 621-622.

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 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 itself¹³—be absolutely immune. Yet we implicitly rejected such derivative immunity in *Butz*.¹⁴ Moreover, in general our cases have followed a

the legislative immunity provided to United States Senators and Representatives under the Speech and Debate Clause. See *Eastland v. United States Servicemen's Fund*, 421 U. S. 491 (1975); *Doe v. McMillan*, 412 U. S. 306 (1973).

¹³See U. S. Const., Art. 2, § 2 ("The President . . . may require the Opinion, in writing, or the principal Officer in each of the executive Departments, upon any Subject relating to the duties of their respective Offices. . . .").

¹⁴THE CHIEF JUSTICE, *post*, at 7, argues that senior Presidential aides work "more intimately on a daily basis [with the President] than does a Cabinet officer," and that *Butz* therefore is not controlling. In recent

"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. In *Gravel*, for example, we emphasized that Senators and their aides were absolutely immune only when performing "acts legislative in nature," and not when taking other acts even "in their official capacity." 408 U. S., at 625. See *Hutchinson v. Proxmire*, 443 U. S. 111, 125-133 (1979). Our cases involving judges¹⁶ and prosecutors¹⁶ have followed a similar line. The undifferentiated extension of absolute "derivative" immunity 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.¹⁷

years, however, such men as Henry Kissinger and James Schlesinger have served in both Presidential advisory and Cabinet positions. Kissinger held both posts simultaneously. 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. *Butz v. Economou* cannot be distinguished on this basis.

¹⁶ See, e. g., *Supreme Court of Virginia v. Virginia Consumers Union*, 446 U. S. 719, 731-737 (1980); *Stump v. Sparkman*, *supra*, 438 U. S., at 382.

¹⁷ In *Imbler v. Pachtman*, 424 U. S. 409, 430-431 (1973), this Court reserved the question whether absolute immunity would extend to "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer." Since that time the courts of appeals generally have ruled prosecutors do not enjoy absolute immunity for acts taken in those capacities. See, e. g., *Mancini v. Lister*, 630 F. 2d 990, 992 (CA3 1980); *Forsyth v. Kleindeinstat*, 599 F. 2d 1203, 1213-1214 (CA3 1979). This Court at least implicitly has drawn the same distinction in extending absolute immunity to executive officials when they are engaged in quasi-prosecutorial functions. See *Butz v. Economou*, *supra*, 438 U. S., at 515-517.

¹⁸ Our decision today in *Nixon v. Fitzgerald*, *ante*, in no way abrogates this general rule. As we explained in that opinion, the recognition of absolute immunity for all of a President's acts in office derives in principal part

C

Petitioners also assert an entitlement to immunity based on the "special functions" of White House aides. This form of argument accords with the analytical approach of our cases. 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.¹² But a "special functions" rationale does not warrant a blanket recognition of absolute immunity for all Presidential aides in the performance of all their duties. This conclusion too follows from our decision in *Butz*, which establishes that an executive official's claim to absolute immunity must be justified by reference to the public interest in the special functions of his office, not the mere fact of high station.¹³

from factors unique to his constitutional responsibilities and station. Suits against other officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself.

¹² Cf. *United States v. Nixon*, 418 U. S. 683, 710-711 (1974) ("[C]ourts have traditionally shown the utmost deference to Presidential responsibilities" for foreign policy and military affairs, and claims of privilege in this area would receive a higher degree of deference than invocations of "a President's generalized interest in confidentiality."); *Katz v. United States*, 389 U. S. 347, 364 (1967) (WHITE, J., concurring) ("We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.") (emphasis added).

¹³ *Gravel, supra*, points to a similar conclusion. We fairly may assume that some aides are assigned to act as Presidential "alter egos," *Gravel, supra*, 408 U. S., at 616-617, in the exercise of functions for which absolute immunity is "essential for the conduct of the public business," *Butz, supra*, 438 U. S., at 507. Cf. *Gravel, supra*, 408 U. S., at 620 (derivative immunity extends only to acts within the "central role" of the Speech and Debate Clause in permitting free legislative speech and debate). By analogy to *Gravel*, a derivative claim to Presidential immunity would be strongest in

Butz also identifies the location of the burden of proof. The burden of justifying absolute immunity rests on the official asserting the claim. 438 U. S., at 506. We have not of course had occasion to identify how a Presidential aide might carry this burden. But the general requisites are familiar in our cases. 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.²⁰ He then must demonstrate that he was discharging the protected function when performing the act for which liability is asserted.²¹

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." *Butz, supra*, at 506. 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. We do not, however, foreclose the possibility that petitioners, on remand, could satisfy the standards properly applicable to their claims.

such "central" Presidential domains as foreign policy and national security, in which the President could not discharge his singularly vital mandate without delegating functions nearly as sensitive as his own.

²⁰ Here as elsewhere the relevant judicial inquiries would encompass considerations of public policy, the importance of which should be confirmed either by reference to the common law or, more likely, our constitutional heritage and structure. See *Nixon v. Fitzgerald, ante*, at —.

²¹ The need for such an inquiry is implicit in *Butz v. Economou, supra*, 438 U. S., at 508-517; see *Imbler v. Pachtman*, 424 U. S. 409, 430-431 (1976). Cases involving immunity under the Speech and Debate Clause have inquired explicitly into whether particular acts and activities qualified for the protection of the Clause. See, e. g., *Hutchinson v. Proxmire, supra*; *Doe v. McMillan*, 412 U. S. 306 (1973); *Gravel v. United States, supra*.

IV

Even if they cannot establish that their official functions require absolute immunity, petitioners assert that public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial. We agree.

A

As we recognized today in *Nixon v. Fitzgerald*, ante, at —, 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. *Butz v. Economou*, 438 U. S., at 506; see *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 410 (1971) ("For people in *Bivens*' shoes, it is damages or nothing."). It is this recognition that has required the denial of absolute immunity to most public officers. 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 the society as a whole.²² These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from the acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177, F. 2d 579, 581 (CA2 1949), cert. denied, 339 U. S. 949 (1950).

In identifying qualified immunity as the best attainable ac-

²² See generally Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup. Ct. Rev. 281, 324-327.

commodation of competing values, in *Butz, supra*, at 507-508, as in *Scheuer*, 416 U. S., at 245-248, we relied on the assumption that this standard would permit "[i]nsubstantial lawsuits [to] be quickly terminated." 438 U. S., at 507-508; see *Hanrahan v. Hampton*, 446 U. S. 754, 765 (POWELL, J., concurring in part and dissenting in part).²³ Yet petitioners advance persuasive arguments that the dismissal of insubstantial lawsuits without trial—a factor presupposed in the balance of competing interests struck by our prior cases—requires an adjustment of the "good faith" standard established by our decisions.

B

Qualified or "good faith" immunity is an affirmative defense that must be pleaded by a defendant official. *Gomez v. Toledo*, 446 U. S. 635 (1980).²⁴ 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." *Wood v. Strickland*, 420 U. S. 308, 320 (1975). The subjective component refers to "permissible intentions." *Ibid.* Characteristically the Court has defined these elements by identifying the circum-

²³The importance of this consideration hardly needs emphasis. This Court has noted the risk imposed upon political officials who must defend their actions and motives before a jury. See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U. S. 391, 405 (1979); *Tenney v. Brandhove*, 341 U. S. 367, 377-378 (1951). As the Court observed in *Tenney*, "In times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed." 341 U. S., at 378.

²⁴Although *Gomez* presented the question in the context of an action under § 1983, the Court's analysis indicates that "immunity" must also be pleaded as a defense in actions under the Constitution and laws of the United States. See 446 U. S., at 640. *Gomez* did not decide which party bore the burden of proof on the issue of good faith. *Id.*, at 642 (REHNQUIST, J., concurring).

stances in which qualified immunity would *not* be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if 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. . . ." *Id.*, at 321-322 (emphasis added).²⁵

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.²⁶ 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.²⁷

²⁵ In *Wood* the Court explicitly limited its holding to the circumstances in which a school board member, "in the specific context of school discipline," 420 U. S., at 321, would be stripped of claimed immunity in an action under § 1983. Subsequent cases, however, have quoted the *Wood* formulation as a general statement of the qualified immunity standard. See, e. g., *Procunier v. Navarette*, 434 U. S. 555, 562-563, 566 (1978), quoted in *Baker v. McCollan*, 443 U. S. 137, 139 (1979).

²⁶ The Rule states that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether summary judgment is proper, a court ordinarily must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party. E. g., *Poller v. Columbia Broadcasting System, Inc.*, 368 U. S. 454, 473 (1962).

²⁷ E. g., *Landrum v. Moats*, 576 F. 2d 1320, 1329 (CA8 1978); *Duchesne v. Sugarman*, 566 F. 2d 817, 832-833 (CA2 1977); cf. *Hutchinson v. Proxmire*, 438 U. S. 111, 120, n. 9 (1979) (questioning whether the existence of "actual malice," as an issue of fact, may properly be decided on summary

In the context of *Butz's* attempted balancing of competing values, it is now 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.²⁸ Inquiries of this kind can be peculiarly disruptive of effective government.²⁹

judgment in a suit alleging libel of a public figure).

²⁸ In suits against a President’s closest aides, discovery of this kind frequently could implicate separation-of-powers concerns. As the Court recognized in *United States v. Nixon*, 418 U. S. 683, 708 (1974):

“A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.”

²⁹ As Judge Gesell observed in his concurring opinion in *Kissinger v. Halperin*, 606 F. 2d 1192, 1214 (CA DC 1979), *aff’d* by an equally divided vote, 452 U. S. 713 (1981):

“We should not close our eyes to the fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits

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. *Procunier v. Navarette*, 434 U. S. 555, 565, (1978); *Wood v. Strickland*, *supra*, 420 U. S., at 321.²⁰

Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law,²¹ should avoid excessive disruption of government and

seeking damage awards against high government officials based on alleged constitutional torts. Each such suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discovery is wide-ranging, time-consuming, and not without considerable cost to the officials involved. It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient [to force a trial] The effect of this development upon the willingness of individuals to serve their country is obvious."

"This case involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under § 1983. We have found previously, however, that "it would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Butz v. Economou*, 438 U. S., at 504.

Our decision in no way diminishes the absolute immunity currently available to officials whose functions have been held to require a protection of this scope.

²¹ This case involves no claim that Congress has expressed its intent to

omission

permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was "clearly established" at the time an action occurred.²² If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, however, the immunity defense ordinarily should fail since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

By defining the limits of qualified immunity 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.²³ But where an official's

impose "no fault" tort liability on high federal officials for violations of particular statutes or the Constitution.

²² As in *Procunier v. Navarette*, 434 U. S. 555, 565 (1978), we need not define here the circumstances under which "the state of the law" should be "evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court."

²³ Cf. *Procunier v. Navarette*, *supra*, 434 U. S., at 565 (footnote omitted)

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." *Pierson v. Ray*, 386 U. S. 547, 554 (1967).³⁴

C

In this case petitioners have asked us to hold that the respondent's pre-trial showings were insufficient to survive their motion for summary judgment.³⁵ We think it appropriate, however, to remand the case to the District Court, for its reconsideration of this issue in light of this opinion.³⁶ The

("Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for established law that their conduct 'cannot reasonably be characterized as being in good faith.'")

³⁴ We emphasize that our decision applies only to suits for civil damages arising from actions within the scope of an official's duties and in "objective" good faith. We express no view as to the conditions in which injunctive or declaratory relief might be available.

³⁵ In *Butz*, we admonished that "insubstantial" suits against high public officials should not be allowed to proceed to trial. 438 U. S., at 438. See *Schuck, supra*, 1980 Sup. Ct. Rev., at 324-327. We reiterate this admonition. Insubstantial lawsuits undermine the effectiveness of Government as contemplated by our constitutional structure, and "firm application of the Federal Rules of Civil Procedure" is fully warranted in such cases. *Id.*, at 508.

³⁶ Petitioners also have urged us, prior to the remand, to rule on the legal sufficiency of respondent's "implied" causes of action under 5 U. S. C. § 7211 and 18 U. S. C. § 1505 and his *Bivens* claim under the First Amendment. We do not view petitioners' argument on the statutory question as insubstantial. Cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, — U. S. —, — (1982) (controlling question in implication of statutory causes of action is whether Congress affirmatively intended to create a damages remedy); *Middlesex County Sewerage Auth. v. National Sea Clammers Assn.*, 453 U. S. 1, (1981) (same); *Texas Industries, Inc. v. Radcliff Materials*, 451 U. S. 630, 638-639 (1981) (same). Nor is the *Bivens* question. Cf. *Bush v. Lucas*, 647 F. 2d 573, 576 (CA5 1981), affirming on remand 598 F. 2d 958 (CA5 1979) (holding that the "unique rela-

trial court is more familiar with the record so far developed and also is better situated to make any such further findings as may be necessary.

V

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

So ordered.

tionship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a *Bivens* remedy"). As in *Nixon v. Fitzgerald*, *ante*, however, we took jurisdiction of the case only to resolve the immunity question under the collateral order doctrine. We therefore think it appropriate to leave these questions for fuller consideration by the District Court and, if necessary, by the Court of Appeals.

13 and stylistic

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: NOV 19 1982

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS v. A. ERNEST FITZGERALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June —, 1982]

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.

I

In this suit for civil damages petitioners Bryce Harlow and Alexander Butterfield are alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the respondent A. Ernest Fitzgerald. Respondent avers that petitioners entered the conspiracy in their capacities as senior White House aides to former President Richard M. Nixon. As the alleged conspiracy is the same as that involved in *Nixon v. Fitzgerald*, *ante*, the facts need not be repeated in detail.

Respondent claims that Harlow joined the conspiracy in his role as the Presidential aide principally responsible for congressional relations.¹ At the conclusion of discovery the

¹ Harlow held this position from the beginning of the Nixon Administration on January 20, 1969 through November 4, 1969. On that date he was designated as Counsellor to the President, a position accorded Cabinet status. He served in that capacity until December 9, 1970, when he returned to private life. Harlow later resumed the duties of Counsellor for the pe-

supporting evidence remained inferential. As evidence of Harlow's conspiratorial activity respondent relies heavily on a series of conversations in which Harlow discussed Fitzgerald's dismissal with Air Force Secretary Robert Seamans.² The other evidence most supportive of Fitzgerald's claims consists in a recorded conversation in which the President later voiced a tentative recollection that Harlow was "all for canning" Fitzgerald.³

Disputing Fitzgerald's contentions, Harlow argues that exhaustive discovery has adduced no direct evidence of his in-

ried from July 1, 1973 through April 14, 1974. Respondent appears to allege that Harlow continued in a conspiracy against him throughout the various changes of official assignment.

²The record reveals that Secretary Seamans called Harlow in May, 1969, to inquire about likely congressional reaction to a draft reorganization plan that would cause Fitzgerald's dismissal. According to Seamans' testimony, "we [the Air Force] didn't ask [Harlow] to pass judgment on the action itself. We just asked him what the impact would be in the relationship with the Congress." App. 153, 164-165 (Deposition of Robert Seamans). Through an aide Harlow responded that "this was a very sensitive item on the Hill and that it would be [his] recommendation that [the Air Force] not proceed to make such a change at that time." *Id.*, at 152. But the Air Force persisted. Seamans spoke to Harlow on at least one subsequent occasion during the spring of 1969. The record also establishes that Secretary Seamans called Harlow on November 4, 1969, shortly after the public announcement of Fitzgerald's impending dismissal, and again in December 1969. See App. 186.

³See App. 284. (Transcript of a Recorded Conversation between Richard Nixon and Ronald Ziegler, February 26, 1973). In a conversation with the President on January 31, 1973, John Ehrlichman also recalled that Harlow had discussed the Fitzgerald case with the President. See App. 218-221. (Transcript of Recorded Conversation between Richard Nixon and John Ehrlichman, January 31, 1973). In the same conversation the President himself asserted that he had spoken to Harlow about the Fitzgerald matter, see *id.*, at 218, but the parties continue to dispute whether Mr. Nixon—at the most relevant moments in the discussion—was confusing Fitzgerald's case with that of another dismissed employee. The President explicitly stated at one point that he previously had been confused. See *id.*, at 220.

volvement in any wrongful activity.⁴ Petitioner avers that Secretary Seamans advised him that considerations of efficiency required Fitzgerald's removal by a reduction in force, despite anticipated adverse congressional reaction. Harlow asserts he had no reason to believe that a conspiracy existed. He contends that he took all his actions in good faith.⁵

Petitioner Butterfield also is alleged to have entered the conspiracy not later than May 1969. Employed as Deputy Assistant to the President and Deputy Chief of Staff to H.R. Haldeman,⁶ Butterfield circulated a White House memorandum in that month in which he claimed to have learned that Fitzgerald planned to "blow the whistle" on some "shoddy purchasing practices" by exposing these practices to public view.⁷ Fitzgerald characterizes this memorandum as evi-

⁴ See Defendants Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment (Memorandum in Support of Summary Judgment), at 7 (Civil No. 74-178, Feb. 12, 1980).

⁵ In support of his version of events Harlow relies particularly on the deposition testimony of Air Force Secretary Seamans, who stated that he regarded abolition of Fitzgerald's position as necessary "to improve the efficiency" of the Financial Management Office of the Air Force and that he never received any White House instruction regarding the Fitzgerald case. App. 159-160. Petitioner also disputes the probative value of Richard Nixon's recorded remark that Harlow had supported Fitzgerald's firing. Harlow emphasizes the tentativeness of the President's statement. To the President's query whether Harlow was "all for canning [Fitzgerald], wasn't he?", White House Press Secretary Ronald Ziegler in fact gave a negative reply: "No, I think Bryce may have been the other way." App. 284. The President did not respond to Ziegler's comment.

⁶ The record establishes that Butterfield worked from an office immediately adjacent to the oval office. He had almost daily contact with the President until March 1973, when he left the White House to become Administrator of the Federal Aviation Administration.

⁷ App. 274. Butterfield reported that this information had been referred to the Federal Bureau of Investigation. In the memorandum Butterfield reported that he had received the information "by word of several mouths, but allegedly from a senior AFL-CIO official originally Evidently, Fitzgerald attended a recent meeting of the National Democratic

dence that Butterfield had commenced efforts to secure Fitzgerald's retaliatory dismissal. As evidence that Butterfield participated in the conspiracy to conceal his unlawful discharge and prevent his reemployment, Fitzgerald cites communications between Butterfield and Haldeman in December 1969 and January 1970. After the President had promised at a press conference to inquire into Fitzgerald's dismissal, Haldeman solicited Butterfield's recommendations. In a subsequent memorandum emphasizing the importance of "loyalty," Butterfield counselled against offering Fitzgerald another job in the Administration at that time.⁹

For his part, Butterfield denies that he was involved in any decision concerning Fitzgerald's employment status until Haldeman sought his advice in December 1969—more than a month after Fitzgerald's termination had been scheduled and announced publicly by the Air Force. Butterfield states that he never communicated his views about Fitzgerald to any official of the Defense Department. He argues generally that nearly eight years of discovery have failed to turn up any evidence that he caused injury to Fitzgerald.¹⁰

Together with their codefendant Richard Nixon, petitioners Harlow and Butterfield moved for summary judgment on February 12, 1980. In denying the motion the District Court upheld the legal sufficiency of Fitzgerald's *Bivens* claim under the First Amendment and his "inferred" statutory causes of action under 5 U. S. C. § 7211 and 18 U. S. C. § 1505.¹¹ The court found that genuine issues of disputed fact

Coalition and, while there, revealed his intentions to a labor representative who, fortunately for us, was unsympathetic." *Ibid.*

⁹ App. 99-100, 180-181. This memorandum, quoted in *Nixon v. Fitzgerald*, *ante*, at 3, was not sent to the Defense Department.

¹⁰ See Memorandum in Support of Summary Judgment, *supra*, at 26. The history of Fitzgerald's litigation is recounted in *Nixon v. Fitzgerald*, *ante*. Butterfield was named as a defendant in the initial civil action filed by Fitzgerald in 1974. Harlow was named for the first time in respondent's Second Amended Complaint of July 5, 1978.

¹¹ The first of these statutes, 5 U. S. C. § 7211 (Supp. III 1979), pro-

remained for resolution at trial. It also ruled that petitioners were not entitled to absolute immunity. Pet. App. 1-8.

Independently of former President Nixon, petitioners invoked the collateral order doctrine and appealed the denial of their immunity defense to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed the appeal without opinion. Pet. App. 11-12. Never having determined the immunity available to the senior aides and advisers of the President of the United States, we granted certiorari. 452 U. S. 957 (1981).¹¹

II

As we reiterated today in *Nixon v. Fitzgerald*, *ante*, 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.

vides generally that "The right of employees . . . to . . . furnish information to either House of Congress, or to a committee or a Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. Neither expressly creates a private right to sue for damages. Petitioners argue that the District Court erred in finding that a private cause of action could be inferred under either statute, and that "special factors" present in the context of the federal employer-employee relationship preclude the recognition of respondent's *Bivens* action under the First Amendment. The legal sufficiency of respondent's asserted causes of action is not, however, a question that we view as properly presented for our decision in the present posture of this case. See note 36, *infra*.

¹¹ As in *Nixon v. Fitzgerald*, *ante*, our jurisdiction has been challenged on the basis that the District Court's order denying petitioners' claim of absolute immunity was not an appealable final order and that the Court of Appeals' dismissal of petitioners' appeal establishes that this case was never "in" the Court of Appeals within the meaning of 28 U. S. C. § 1254. As the discussion in *Nixon* establishes our jurisdiction in this case as well, we need not consider those challenges in this opinion.

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." The absolute immunity of legislators, in their legislative functions, see, e. g., *Eastland v. United States Servicemen's Fund*, 421 U. S. 491 (1975), and of judges, in their judicial functions, see, e. g., *Stump v. Sparkman*, 435 U. S. 349 (1978), now is well settled. Our decisions also have extended absolute immunity to certain officials of the Executive Branch. These include prosecutors and similar officials, see *Butz v. Economou*, 438 U. S. 478, 508-512 (1978), executive officers engaged in adjudicative functions, *id.*, at 513-517, and the President of the United States, see *Nixon v. Fitzgerald*, *ante*.

For executive officials in general, however, our cases make plain that qualified immunity represents the norm. In *Scheuer v. Rhodes*, 416 U. S. 232 (1974), we acknowledged that high officials require greater protection than those with less complex discretionary responsibilities. Nonetheless, we held that a governor and his aides could receive the requisite protection from qualified or good-faith immunity. *Id.*, at 247-248. In *Butz v. Economou*, *supra*, we extended the approach of *Scheuer* to high federal officials of the Executive Branch. Discussing in detail the considerations that also had underlain our decision in *Scheuer*, we explained that the recognition of a qualified immunity defense for high executives reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, 438 U. S., at 504-505, but also "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Id.*, at 506. Without discounting the adverse consequences of denying high officials an absolute immunity from private lawsuits alleging constitutional violations—consequences found sufficient in *Spalding v. Vilas*, 161 U. S. 483 (1896), and *Barr v. Matteo*, 360 U. S. 564

(1959), to warrant extension to such officials of absolute immunity from suits at common law—we emphasized our expectation that insubstantial suits need not proceed to trial:

"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 *Scheur* 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." 438 U. S., at 507-508 (citations omitted).

Butz continued to acknowledge that the special functions of some officials might require absolute immunity. But the Court held that "federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope." *Id.*, at 506. This we reaffirmed today in *Nixon v. Fitzgerald*, *ante*, at 15.

III

Petitioners argue that they are entitled to a blanket protection of absolute immunity as an incident of their offices as Presidential aides. In deciding this claim we do not write on an empty page. In *Butz v. Economou*, *supra*, the Secretary of Agriculture—a Cabinet official directly accountable to the President—asserted a defense of absolute official immunity from suit for civil damages. We rejected his claim. In so doing we did not question the power or the importance of the Secretary's office. Nor did we doubt the importance to the

President of loyal and efficient subordinates in executing his duties of office. Yet we found these factors, alone, to be insufficient to justify absolute immunity. "[T]he greater power of [high] officials," we reasoned, "affords a greater potential for a regime of lawless conduct." 438 U. S., at 506. Damages actions against high officials were therefore "an important means of vindicating constitutional guarantees." *Ibid.* Moreover, we concluded that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Id.*, at 504.

Having decided in *Butz* 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.

B

In disputing the controlling authority of *Butz*, petitioners rely on the principles developed in *Gravel v. United States*, 408 U. S. 606 (1972).¹² In *Gravel* we endorsed the view that

¹² Petitioners also claim support from other cases that have followed *Gravel* in holding that Congressional employees are derivatively entitled to the legislative immunity provided to United States Senators and Representatives under the Speech and Debate Clause. See *Eastland v. United States Servicemen's Fund*, 421 U. S. 491 (1975); *Doe v. McMillan*, 412 U. S. 306 (1973).

"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. . . ." *Id.*, at 616-617. 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. *Id.*, at 621-622.

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 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 itself¹³—be absolutely immune. Yet we implicitly rejected such derivative immunity in *Butz*.¹⁴ Moreover, in general our cases have followed a

¹³ See U. S. Const., Art. 2, § 2 ("The President . . . may require the Opinion, in writing, or the principal Officer in each of the executive Departments, upon any Subject relating to the duties of their respective Offices. . . .").

¹⁴ THE CHIEF JUSTICE, *post*, at 9, argues that senior Presidential aides work "more intimately on a daily basis [with the President] than does a Cabinet officer," and that *Butz* therefore is not controlling. In recent years, however, such men as Henry Kissinger and James Schlesinger have served in both Presidential advisory and Cabinet positions. Kissinger held both posts simultaneously. In our view it is impossible to generalize about the role of "offices" in an individual President's administration with-

"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. In *Gravel*, for example, we emphasized that Senators and their aides were absolutely immune only when performing "acts legislative in nature," and not when taking other acts even "in their official capacity." 408 U. S., at 625. See *Hutchinson v. Proxmire*, 443 U. S. 111, 125-133 (1979). Our cases involving judges¹⁶ and prosecutors¹⁷ have followed a similar line. The undifferentiated extension of absolute "derivative" immunity 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.¹⁷

C

out reference to the functions that particular officeholders are assigned by the President. *Butz v. Economou* cannot be distinguished on this basis.

¹⁶ See, e. g., *Supreme Court of Virginia v. Virginia Consumers Union*, 446 U. S. 719, 731-737 (1980); *Stump v. Sparkman*, *supra*, 438 U. S., at 362.

¹⁷ In *Imbler v. Pachtman*, 424 U. S. 409, 430-431 (1973), this Court reserved the question whether absolute immunity would extend to "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer." Since that time the courts of appeals generally have ruled prosecutors do not enjoy absolute immunity for acts taken in those capacities. See, e. g., *Mancini v. Lester*, 630 F. 2d 990, 992 (CA3 1980); *Forsyth v. Kleindeinst*, 599 F. 2d 1203, 1213-1214 (CA3 1979). This Court at least implicitly has drawn the same distinction in extending absolute immunity to executive officials when they are engaged in quasi-prosecutorial functions. See *Butz v. Economou*, *supra*, 438 U. S., at 515-517.

¹⁸ Our decision today in *Nixon v. Fitzgerald*, *ante*, in no way abrogates this general rule. As we explained in that opinion, the recognition of absolute immunity for all of a President's acts in office derives in principal part from factors unique to his constitutional responsibilities and station. Suits against other officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself.

Petitioners also assert an entitlement to immunity based on the "special functions" of White House aides. This form of argument accords with the analytical approach of our cases. 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.¹⁸ But a "special functions" rationale does not warrant a blanket recognition of absolute immunity for all Presidential aides in the performance of all their duties. This conclusion too follows from our decision in *Butz*, which establishes that an executive official's claim to absolute immunity must be justified by reference to the public interest in the special functions of his office, not the mere fact of high station.¹⁹

Butz also identifies the location of the burden of proof. The burden of justifying absolute immunity rests on the official asserting the claim. 438 U. S., at 506. We have not of

¹⁸Cf. *United States v. Nixon*, 418 U. S. 683, 710-711 (1974) ("[C]ourts have traditionally shown the utmost deference to Presidential responsibilities" for foreign policy and military affairs, and claims of privilege in this area would receive a higher degree of deference than invocations of "a President's generalized interest in confidentiality."); *Katz v. United States*, 389 U. S. 347, 364 (1967) (WHITE, J., concurring) ("We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.") (emphasis added).

¹⁹*Gravel, supra*, points to a similar conclusion. We fairly may assume that some aides are assigned to act as Presidential "alter egos," *Gravel, supra*, 408 U. S., at 616-617, in the exercise of functions for which absolute immunity is "essential for the conduct of the public business," *Butz, supra*, 438 U. S., at 507. Cf. *Gravel, supra*, 408 U. S., at 620 (derivative immunity extends only to acts within the "central role" of the Speech and Debate Clause in permitting free legislative speech and debate). By analogy to *Gravel*, a derivative claim to Presidential immunity would be strongest in such "central" Presidential domains as foreign policy and national security, in which the President could not discharge his singularly vital mandate without delegating functions nearly as sensitive as his own.

course had occasion to identify how a Presidential aide might carry this burden. But the general requisites are familiar in our cases. 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.²⁰ He then must demonstrate that he was discharging the protected function when performing the act for which liability is asserted.²¹

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." *Butz, supra*, at 506. 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. We do not, however, foreclose the possibility that petitioners, on remand, could satisfy the standards properly applicable to their claims.

IV

Even if they cannot establish that their official functions require absolute immunity, petitioners assert that public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims

²⁰ Here as elsewhere the relevant judicial inquiries would encompass considerations of public policy, the importance of which should be confirmed either by reference to the common law or, more likely, our constitutional heritage and structure. See *Nixon v. Fitzgerald, ante*, at —.

²¹ The need for such an inquiry is implicit in *Butz v. Economou, supra*, 438 U. S., at 508-517; see *Imbler v. Pachtman*, 424 U. S. 409, 430-431 (1976). Cases involving immunity under the Speech and Debate Clause have inquired explicitly into whether particular acts and activities qualified for the protection of the Clause. See, e. g., *Hutchinson v. Proxmire, supra*; *Doe v. McMillan*, 412 U. S. 306 (1973); *Gravel v. United States, supra*.

without resort to trial. We agree.

A

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. *Butz v. Economou*, 438 U. S., at 506; see *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 410 (1971) ("For people in *Bivens*' shoes, it is damages or nothing."). It is this recognition that has required the denial of absolute immunity to most public officers. 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 the society as a whole.²² These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from the acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177, F. 2d 579, 581 (CA2 1949), cert. denied, 339 U. S. 949 (1950).

In identifying qualified immunity as the best attainable accommodation of competing values, in *Butz*, *supra*, at 507-508, as in *Scheuer*, 416 U. S., at 245-248, we relied on the assumption that this standard would permit "[i]nsubstantial lawsuits [to] be quickly terminated." 438 U. S., at 507-508; see *Hanrahan v. Hampton*, 446 U. S. 754, 765 (POWELL, J., concurring in part and dissenting in part).²³

²² See generally Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup. Ct. Rev. 281, 324-327.

²³ The importance of this consideration hardly needs emphasis. This Court has noted the risk imposed upon political officials who must defend

Yet petitioners advance persuasive arguments that the dismissal of insubstantial lawsuits without trial—a factor presupposed in the balance of competing interests struck by our prior cases—requires an adjustment of the “good faith” standard established by our decisions.

B

Qualified or “good faith” immunity is an affirmative defense that must be pleaded by a defendant official. *Gomez v. Toledo*, 446 U. S. 635 (1980).²⁴ 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.” *Wood v. Strickland*, 420 U. S. 308, 320 (1975). The subjective component refers to “permissible intentions.” *Ibid.* Characteristically the Court has defined these elements by identifying the circumstances in which qualified immunity would *not* be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if 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, . . .” *Id.*, at 321–322 (emphasis added).²⁵

their actions and motives before a jury. See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U. S. 391, 405 (1979); *Tenney v. Brandhove*, 341 U. S. 367, 377–378 (1951). As the Court observed in *Tenney*, “In times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed.” 341 U. S., at 378.

²⁴ Although *Gomez* presented the question in the context of an action under § 1983, the Court’s analysis indicates that “immunity” must also be pleaded as a defense in actions under the Constitution and laws of the United States. See 446 U. S., at 640. *Gomez* did not decide which party bore the burden of proof on the issue of good faith. *Id.*, at 642 (REHNQUIST, J., concurring).

²⁵ In *Wood* the Court explicitly limited its holding to the circumstances in

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.³⁰ 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.³¹

In the context of *Butz*'s 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 "minis-

which a school board member, "in the specific context of school discipline," 420 U. S., at 321, would be stripped of claimed immunity in an action under § 1983. Subsequent cases, however, have quoted the *Wood* formulation as a general statement of the qualified immunity standard. See, e. g., *Procunier v. Navarette*, 434 U. S. 555, 562-563, 566 (1978), quoted in *Baker v. McCollan*, 443 U. S. 157, 139 (1979).

³⁰The Rule states that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether summary judgment is proper, a court ordinarily must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party. E. g., *Poller v. Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962).

³¹E. g., *Landrum v. Moats*, 576 F. 2d 1320, 1329 (CA8 1978); *Duchene v. Sugarman*, 566 F. 2d 817, 832-833 (CA2 1977); cf. *Hutchinson v. Proxmire*, 433 U. S. 111, 126, n. 9 (1979) (questioning whether the existence of "actual malice," as an issue of fact, may properly be decided on summary judgment in a suit alleging libel of a public figure).

terial" 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.²² Inquiries of this kind can be peculiarly disruptive of effective government.²³

²² In suits against a President's closest aides, discovery of this kind frequently could implicate separation-of-powers concerns. As the Court recognized in *United States v. Nixon*, 418 U. S. 683, 708 (1974):

"A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."

²³ As Judge Gesell observed in his concurring opinion in *Kissinger v. Halperin*, 606 F. 2d 1192, 1214 (CA DC 1979), *aff'd* by an equally divided vote, 452 U. S. 713 (1981):

"We should not close our eyes to the fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials based on alleged constitutional torts. Each such suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discovery [*sic*] is wide-ranging, time-consuming, and not without considerable cost to the officials involved. It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be suffi-

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. *Procunier v. Navarette*, 434 U. S. 555, 565, (1978); *Wood v. Strickland*, *supra*, 420 U. S., at 321.²⁰

Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law,²¹ should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was "clearly established" at the time an action occurred.²² If the law at that time was not

cient [to force a trial] The effect of this development upon the willingness of individuals to serve their country is obvious."

²⁰ This case involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under § 1983. We have found previously, however, that "it would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Butz v. Economou*, 438 U. S., at 504.

Our decision in no way diminishes the absolute immunity currently available to officials whose functions have been held to require a protection of this scope.

²¹ This case involves no claim that Congress has expressed its intent to impose "no fault" tort liability on high federal officials for violations of particular statutes or the Constitution.

²² As in *Procunier v. Navarette*, 434 U. S. 555, 565 (1978), we need not define here the circumstances under which "the state of the law" should be "evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court."

clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

By defining the limits of qualified immunity 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.³³ 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." *Pierson v. Ray*, 386 U. S. 547, 554 (1967).³⁴

³³ Cf. *Procunier v. Navarette*, *supra*, at 565 (footnote omitted) ("Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for established law that their conduct 'cannot reasonably be characterized as being in good faith.'")

³⁴ We emphasize that our decision applies only to suits for civil damages arising from actions within the scope of an official's duties and in "objec-

C

In this case petitioners have asked us to hold that the respondent's pre-trial showings were insufficient to survive their motion for summary judgment.³⁰ We think it appropriate, however, to remand the case to the District Court, for its reconsideration of this issue in light of this opinion.³¹ The trial court is more familiar with the record so far developed and also is better situated to make any such further findings as may be necessary.

live" good faith. We express no view as to the conditions in which injunctive or declaratory relief might be available.

³⁰ In *Butz*, we admonished that "insubstantial" suits against high public officials should not be allowed to proceed to trial. 438 U. S., at 438. See *Schuck, supra*, 1980 Sup. Ct. Rev., at 324-327. We reiterate this admonition. Insubstantial lawsuits undermine the effectiveness of Government as contemplated by our constitutional structure, and "firm application of the Federal Rules of Civil Procedure" is fully warranted in such cases. *Id.*, at 508.

³¹ Petitioners also have urged us, prior to the remand, to rule on the legal sufficiency of respondent's "implied" causes of action under 5 U. S. C. § 7211 and 18 U. S. C. § 1505 and his *Bivens* claim under the First Amendment. We do not view petitioners' argument on the statutory question as insubstantial. Cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, — U. S. —, — (1982) (controlling question in implication of statutory causes of action is whether Congress affirmatively intended to create a damages remedy); *Middlesex County Sewerage Auth. v. National Sea Clammers Assn.*, 453 U. S. 1, (1981) (same) *Texas Industries, Inc. v. Radcliff Materials*, 451 U. S. 630, 638-639 (1981) (same). Nor is the *Bivens* question. Cf. *Bush v. Lucas*, 647 F. 2d 573, 576 (CA5 1981), affirming on remand 598 F. 2d 958 (CA5 1979) (holding that the "unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a *Bivens* remedy"). As in *Nixon v. Fitzgerald, ante*, however, we took jurisdiction of the case only to resolve the immunity question under the collateral order doctrine. We therefore think it appropriate to leave these questions for fuller consideration by the District Court and, if necessary, by the Court of Appeals.

V

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

So ordered.

LFP

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① Dick - even though we gave the history of this case in Nixon, I think we should repeat here - perhaps in a Note - when ^{the} suit was filed, ^{where} Petrs were made parties.

② In Part IV, as illustrative of the expense & intrusion upon duties of officials of these suits, we could add a note repeating (as in Nixon) that already this case has been in litigation — years, with a record of some

CHAMBERS DRAFT
2/27/82

page. SUPREME COURT OF THE UNITED STATES

(Dick - was Harlow in original suit was substituted when Harlow named as a 50)
Butterfield was in orig. B. Harlow was added No. 80-945 in 1978.
BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS v. A. ERNEST FITZGERALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March —, 1982]

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 acts in office.

I

In this suit for civil damages petitioners Bryce Harlow and Alexander Butterfield are alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the respondent A. Ernest Fitzgerald. Respondent avers that petitioners entered the conspiracy in their capacities as senior White House aides to former President Richard M. Nixon. As the alleged conspiracy is the same as that involved in *Nixon v. Fitzgerald*, ante, the facts need not be repeated in detail.

Respondent claims that Harlow joined the conspiracy in his role as the presidential aide principally responsible for congressional relations.¹ At the conclusion of discovery the

¹ Harlow held this position from the beginning of the Nixon Administration on January 20, 1969 through November 4, 1969. On that date he was designated as Counsellor to the President, a position accorded Cabinet status. He served in that capacity until December 9, 1970, when he returned

③ In Nixon we had a note stating that Fitzgerald presented this discharge case to Carl S. Comm & received reimbursement & back pay. What happened ~~later~~. Do you think we generalize reference to Nixon for the facts is sufficient? Perhaps it is.

supporting evidence remained inferential. As evidence of Harlow's conspiratorial activity respondent relies heavily on the history of communication between Harlow and Air Force Secretary Robert Seamans.⁶ The other evidence most supportive of Fitzgerald's claim consists in a recorded conversation in which the President later voiced a tentative recollection that Harlow was "all for canning" Fitzgerald.⁷

Disputing Fitzgerald's contentions, Harlow argues that exhaustive discovery has adduced no direct evidence of his in-

to private life. Harlow later resumed the duties of Counsellor for the period from July 1, 1973 through April 14, 1974. Respondent appears to allege that Harlow continued in a conspiracy against him throughout the various changes of official assignment.

The record reveals that Secretary Seamans called Harlow in May, 1969, to inquire about likely congressional reaction to a draft reorganization plan that would cause Fitzgerald's dismissal. According to Seamans' testimony, "we [the Air Force] didn't ask [Harlow] to pass judgment on the action itself. We just asked him what the impact would be in the relationship with the Congress." App. 153, 164-165 (Deposition of Robert Seamans). Through an aide Harlow responded that "this was a very sensitive item on the Hill and that it would be [his] recommendation that [the Air Force] not proceed to make such a change at that time." *Id.*, at 152. But the Air Force persisted. Seamans spoke to Harlow on at least one subsequent occasion during the spring of 1969. The record also establishes that Secretary Seamans called Harlow on November 4, 1969, shortly after the public announcement of Fitzgerald's impending dismissal, and again in December 1969. See App. 163.

⁶See App. 284. (Transcript of a Recorded Conversation between Richard Nixon and Ronald Ziegler, February 26, 1973). In a conversation with the President on January 31, 1973, John Ehrlichman also recalled that Harlow had discussed the Fitzgerald case with the President. See App. 218-221. (Transcript of Recorded Conversation between Richard Nixon and John Ehrlichman, January 31, 1973). In the same conversation the President himself asserted that he had spoken to Harlow about the Fitzgerald matter, see *ibid.*, at 218, but the parties continue to dispute whether Mr. Nixon—at the most relevant moments in the discussion—was confusing Fitzgerald's case with that of another dismissed employee. The President explicitly stated at one point that he previously had been confused. See *ibid.*, at 220.

a series of
conversations
in which
Harlow
discussed
Fitzgerald's
proposed
dismissal
with

volvement in any wrongful activity.⁴ Petitioner avers that Secretary Seamans advised him that considerations of efficiency required Fitzgerald's removal by a reduction in force, despite anticipated adverse congressional reaction. Harlow asserts he had no reason to believe that a conspiracy existed. He contends that he took all his actions in good faith.⁵

Petitioner Butterfield also is alleged to have entered the conspiracy not later than May 1969. Employed as Deputy Assistant to the President and Deputy Chief of Staff to H.R. Haldeman,⁶ Butterfield circulated a White House memorandum in that month in which he claimed to have learned that Fitzgerald planned to "blow the whistle" on some "shoddy purchasing practices" by exposing these practices to public view.⁷ Fitzgerald characterizes this memorandum as

⁴ See Defendants Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment (Memorandum in Support of Summary Judgment), at 7 (Civil No. 74-178, Feb. 12, 1980).

⁵ In support of his version of events Harlow relies particularly on the deposition testimony of Air Force Secretary Seamans, who stated that he regarded abolition of Fitzgerald's position as necessary "to improve the efficiency" of the Financial Management Office of the Air Force and that he never received any White House instruction regarding the Fitzgerald case. App. 159-160. Petitioner also disputes the probative value of Richard Nixon's recorded remark that Harlow had supported Fitzgerald's firing. Harlow emphasizes the tentativeness of the President's statement. To the President's query whether Harlow was "all for canning [Fitzgerald], wasn't he?", White House Press Secretary Ronald Ziegler in fact gave a negative reply: "No, I think Bryce may have been the other way." App. 284. The President did not respond to Ziegler's comment.

⁶ The record establishes that Butterfield worked from an office immediately adjacent to the oval office. He had almost daily contact with the President until March 1973, when he left the White House to become Administrator of the Federal Aviation Administration.

⁷ App. 274. Butterfield reported that this information had been referred to the Federal Bureau of Investigation. In the memorandum Butterfield reported that he had received the information "by word of several mouths, but allegedly from a senior AFL-CIO official originally. . . . Evidently, Fitzgerald attended a recent meeting of the National Demo-

evidence that Butterfield had commenced efforts to secure Fitzgerald's retaliatory dismissal. As evidence that Butterfield participated in the conspiracy to conceal his unlawful discharge and prevent his reemployment, Fitzgerald relies heavily on communications between Butterfield and Haldeman in December 1969 and January 1970. After the President had promised at a press conference to inquire into Fitzgerald's dismissal, Haldeman solicited Butterfield's recommendations. In a subsequent memorandum emphasizing the importance of "loyalty," Butterfield counselled against offering Fitzgerald another job in the Administration at that time.⁸

For his part, Butterfield denies that he was involved in any decision concerning Fitzgerald's employment status until Haldeman sought his advice in December 1969—more than a month after Fitzgerald's termination had been scheduled and announced publicly by the Air Force. Butterfield states that he never communicated his views about Fitzgerald to any official of the Defense Department. He argues generally that discovery has failed to turn up any evidence that he caused any injury to Fitzgerald.⁹

Together with their codefendant Richard Nixon, petitioners Harlow and Butterfield moved for summary judgment on February 12, 1980. In denying the motion the District Court upheld the legal sufficiency of Fitzgerald's *Bivens* claim under the First Amendment and his "inferred" statutory actions under 5 U. S. C. § 7211 and 18 U. S. C. § 1505.¹⁰

cratic Coalition and, while there, revealed his intentions to a labor representative who, fortunately for us, was unsympathetic." *Ibid.*

⁸ App. 99-100, 180-181. This memorandum was not sent to the Defense Department.

⁹ See Memorandum in Support of Memorandum in Support of Summary Judgment, *supra*, at 26.

¹⁰ Neither of these statutes expressly confers a private right to sue for relief in damages. The first, 5 U. S. C. § 7211 (Supp. III 1979), provides generally that "The right of employees . . . to . . . furnish information to

(nearly eight years of

FN

and each
provides
explicitly
for certain
substantive
remedies.

Deck - I am not sure
that § 7211 provides for
a "supplemental remedy" under
§ 1505 is correct.

The court found that there were genuine issues of disputed fact remaining for resolution at trial. It also ruled that petitioners were not entitled to absolute immunity. Pet. for Cert. 1a-3a.

Independently of former President Nixon, petitioners invoked the collateral order doctrine and appealed the denial of their immunity defense to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed the appeal without opinion⁽¹⁾ Pet. for Cert. 11a-12a. Never having determined the immunity available to the senior aides and advisers of the President of the United States, we granted certiorari. — U. S. —, — (1981).

II

As we reiterated today in *Nixon v. Fitzgerald*, ante, 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

either House of Congress, or to a committee or a Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. As in *Nixon v. Fitzgerald*, ante, we granted certiorari in this case solely to address the "collateral" question whether petitioners enjoyed an immunity from this suit that would be defeated if they were forced to stand trial, even if they subsequently were to prevail in the litigation. In this posture we do not consider the correctness of the District Court's "implication" decision.

See n. 31,
infra.

"As in *Nixon v. Fitzgerald*, ante, our jurisdiction has been challenged on the basis that the District Court's order denying petitioners' claim of absolute immunity was not an appealable final order and that the Court of Appeals' dismissal of petitioners' appeal establishes that this case was never "in" the Court of Appeals within the meaning of 28 U. S. C. § 1254. As the discussion in *Nixon* establishes our jurisdiction in this case as well, we need not consider those challenges in this opinion.

kinds. To officials whose special functions or constitutional status requires complete protection from suit, we have extended the defense of "absolute immunity." The absolute immunity of legislators, in their legislative functions, see, e. g., *Eastland v. United States Servicemen's Fund*, 421 U. S. 491 (1975), and of judges, in their judicial functions, see, e. g., *Stump v. Sparkman*, 435 U. S. 349 (1978), now is well settled. Our decisions also have extended absolute immunity to certain officials of the Executive branch. These include prosecutors and similar officials, see *Butz v. Economou*, *supra*, 438 U. S., at 508-512, executive officers engaged in adjudicative functions, *ibid.*, at 513-517, and the President of the United States, see *Nixon v. Fitzgerald*, *ante*.

For executive officials in general, however, our cases make plain that qualified immunity represents the norm. In *Scheuer v. Rhodes*, 416 U. S. 232 (1974), we acknowledged that high officials require greater protection than those with less complex discretionary responsibilities. Nonetheless, we held that a governor and his aides could receive the requisite protection from qualified or good-faith immunity. *Id.*, at 247-248. In *Butz v. Economou*, *supra*, we extended the approach of *Scheuer* to high federal officials of the Executive branch. Discussing in detail the considerations that also had underlain our decision in *Scheuer*, we explained that the recognition of a qualified immunity defense for high executives reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, 438 U. S., at 504-505, but also "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Id.*, at 506. Without discounting the adverse policy consequences of denying high officials an absolute immunity from private lawsuits—consequences found sufficient in *Spalding v. Vilas*, 161 U. S. 483 (1896), and *Barr v. Matteo*, 360 U. S. 564 (1959), to warrant extension to such

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officials of absolute immunity from suits at common law—we emphasized our expectation that insubstantial suits need not proceed to trial:

“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 *Scheur* 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.” 438 U. S., at 507–508 (citations omitted).

Butz continued to acknowledge that the special functions of some officials might require absolute immunity. But the Court held that “federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.” *Id.*, at 506. This we reaffirmed today in *Nixon v. Fitzgerald*, *ante*.

III

A

Petitioners argue that public policy requires a blanket extension of absolute immunity to presidential aides. In deciding this claim we do not write on an empty page. In *Butz v. Economou*, *supra*, the Secretary of Agriculture—a Cabinet official directly accountable to the President—asserted a defense of absolute official immunity from suit for civil damages. We rejected his claim. In so doing we did not ques-

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*responsibility**stet*

tion the power] or the importance of the Secretary's office. Nor did we doubt the importance to the President of loyal and efficient subordinates in executing his duties of office. Yet we found these factors, alone, to be insufficient to justify absolute immunity. "[T]he greater power of [high] officials," we reasoned, "affords a greater potential for a regime of lawless conduct." 438 U. S., at 506. Damages actions against high officials were therefore "an important means of vindicating constitutional guarantees." *Ibid.* Moreover, we found that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials," *id.*, at 504.

Having decided in *Butz* 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 lodged 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.

B

In disputing the controlling authority of *Butz*, petitioners rely on the principles developed in *Gravel v. United States*, 408 U. S. 606 (1972).²² In *Gravel* we endorsed the view that

²²Petitioners also claim support from other cases that have followed *Gravel* in holding that Congressional employees are derivatively entitled to the legislative immunity provided to United States Senators and Representatives under the Speech and Debate Clause. See *Eastland v. United States Servicemen's Fund*, 421 U. S. 491 (1975); *Doe v. McMillan*, 412

"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. . . ." *Id.*, at 616-617. 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. *Id.*, at 621-622.

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 "derivative" absolute immunity is ~~essential to promote~~ all the policies supporting absolute immunity for the President himself. recognition of

Petitioners' argument is not without force. Ultimately, however, it sweeps too far. If the President's aides are derivatively immune because 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 itself¹⁹—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 this protection. But absolute immunity has extended no further than its justification would warrant. In *Gravel*, for example, we emphasized that Senators and their aides were absolutely immune only when performing "acts legisla-

U. S. 306 (1973).

¹⁹ See U. S. Const., Art. 2, § 2 ("The President . . . may require the Opinion, in writing, or the principal Officer in each of the executive Departments, upon any Subject relating to the duties of their respective Offices. . . .").

absolute immunity

this protection

tive in nature," and not when taking other acts even "in their official capacity." 408 U. S., at 625. Our cases involving judges¹⁴ and prosecutors¹⁵ have followed a similar line. The undifferentiated extension of absolute "derivative" immunity 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.¹⁶

C

Petitioners also assert an entitlement to immunity based on the "special functions" of White House aides. This form of argument is in accord with the analytical approach of our cases. 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 unhesi-

¹⁴ See, e. g., *Supreme Court of Virginia v. Virginia Consumers Union*, — U. S. —, — (1980); *Stump v. Sparkman*, *supra*, 438 U. S., at 362.

¹⁵ In *Imbler v. Pachtman*, 424 U. S. 409, 430–431 (1973), this Court reserved the question whether absolute immunity would extend to "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer." Since that time the courts of appeals generally have ruled prosecutors do not enjoy absolute immunity for acts taken in those capacities. See, e. g., *Mancini v. Lester*, 680 F. 2d 980, 992 (CA3 1980); *Forsyth v. Kleindeinst*, 599 F. 2d 1203, 1213–1214 (CA3 1979). This Court at least implicitly has drawn the same distinction in extending absolute immunity to executive officials when they are engaged in quasi-prosecutorial functions. See *Butz v. Economou*, *supra*, 438 U. S., at 515–517.

¹⁶ Our decision today in *Nixon v. Fitzgerald*, *ante*, in no way abrogates this general rule. As we explained in that opinion, the recognition of absolute immunity for all of a President's acts in office derives in principal part from factors unique to his constitutional station. Suits against other officials—including presidential aides—generally do not invoke the special separation-of-powers considerations implicated by suits against the President himself. See *ante*.

tating performance of functions so vital to the national interest.¹⁷ But a "special functions" rationale does not warrant a blanket extension of absolute immunity to all presidential aides in the performance of all their duties. This conclusion too follows from our decision in *Butz*, which establishes that an executive official's claim to absolute immunity must be justified by reference to the public interest in the special functions of his office, not the mere fact of high station.¹⁸

Butz also identifies the location of the burden of proof. The burden of justifying absolute immunity rests on the official asserting the claim. 438 U. S., at 506. We have not of course had occasion to identify how a presidential aide might meet this test. But the general requisites are familiar in our cases. 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 re-

¹⁷ Cf. *United States v. Nixon*, 418 U. S. 683, 710-711 (1974) ("[C]ourts have traditionally shown the utmost deference to Presidential responsibilities" for foreign policy and military affairs, and claims of privilege in this area would receive a higher degree of deference than invocations of "a President's generalized interest in confidentiality."); *Katz v. United States*, 389 U. S. 347, 364 (1967) (White, J., concurring) ("We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.") (emphasis added).

¹⁸ *Gravel*, *supra*, points to a similar conclusion. We fairly may assume that some aides are assigned to act as presidential "alter egos," *Gravel*, *supra*, 408 U. S., at 616-617, in the exercise of functions for which absolute immunity is "essential for the conduct of the public business," *Butz*, *supra*, 438 U. S., at 507. Cf. *Gravel*, *supra*, 408 U. S., at 620 (derivative immunity extends only to acts within the "central role" of the Speech and Debate Clause in permitting free legislative speech and debate). By analogy to *Gravel*, a derivative claim to presidential immunity would be strongest in such "central" presidential domains as foreign policy and national security, in which the President could not discharge his singularly vital mandate without delegating functions nearly as sensitive as his own.

quire a total shield from liability.¹⁹ He then must demonstrate that he was in fact discharging the protected function when he performed the act for which liability is asserted.²⁰

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." *Butz, supra*, 438 U. S., at 506. 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. We do not, however, foreclose the possibility that petitioners, on remand, could satisfy the standards properly applicable to their claims.

IV

Even if they cannot establish that their official functions require absolute immunity, petitioners assert that public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial. We agree.

¹⁹ Here as elsewhere the relevant judicial inquiries would encompass considerations of public policy, the importance of which should be confirmed either by reference to the common law or, more likely, our constitutional heritage and structure. See *Nixon v. Fitzgerald, ante*.

²⁰ The need for such an inquiry is implicit in *Butz v. Economou, supra*, 438 U. S., at 508-517; see *Imbler v. Pachtman*, 424 U. S. 409, 430-431 (1976). This inquiry has a familiar analogue in the common law: Was the action within the outer perimeter of the official's protected function? See *Spalding v. Vilas*, 161 U. S. 483, 498 (1896) (immunity extends to all matters "committed by law to [an official's] control or supervision"); *Barr v. Matteo*, 380 U. S. 564, 575 (1959) (fact "that the action taken here was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable"). Cases involving immunity under the Speech and Debate Clause have inquired explicitly into whether particular acts and activities qualified for the protection of the Clause. See, e. g., *Gravel v. United States, supra*; *Doe v. McMillan*, 412 U. S. 306 (1973).

PROVINCIAL

^{Executive}
The duties of high officials
often require decisions on
complex and debatable controversial
issues, decisions that sometimes
must be made promptly
and under pressure.
The in-court
examination by
judge or
jury - can
be
effective

80-945-OPINION

HARLOW & BUTTERFIELD v. FITZGERALD

A

As we recognized today in *Nixon v. Fitzgerald*, ante, at —, 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. *Butz v. Economou*, supra, 438 U. S., at 506; see *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 410 (1971) ("For people in *Bivens*' shoes, it is damages or nothing."). It is this recognition that has required the denial of absolute immunity to most public officers. 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 the society as a whole.²¹ These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and—perhaps most important of all—the deterrence of able citizens from the acceptance of public office. ~~The in-court examination of the acts and mental processes of high officials of the Executive Branch is potentially destructive of government.~~ In the case of high officials of the Executive Branch, separation-of-powers concerns require that such an examination not be undertaken lightly.²²

In identifying qualified immunity as the best attainable ac-

²¹ See generally Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup. Ct. Rev. 281.

²² As distinguished commentators have observed, the "separation of powers" is "a 'political doctrine' and not a technical rule of law." Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempt Cases in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1014 (1924). Even where the separation-of-powers doctrine imposes no absolute legal barrier to judicial actions intruding on the functioning of the Executive Branch, the doctrine does require a judicial consideration of the constitutional interests at stake in cases of particular kinds. See *Nixon v. Administrator of GSA*, 433 U. S. 425, 443 (1977); *United States v. Nixon*, 418 U. S. 683, 711-712 (1974).

commodation of competing values, in *Butz*, *supra*, 438 U. S., at 507-508, as in *Scheuer*, *supra*, 416 U. S., at 245-248, we relied on the assumption that this standard would permit "[i]nsubstantial lawsuits [to] be quickly terminated." *Butz*, *supra*, 438 U. S., at 507-508; see *Hanrahan v. Hampton*, 446 U. S. 754, 765 (POWELL, J., concurring in part and dissenting in part).²² Yet petitioners advance persuasive arguments that the dismissal of insubstantial lawsuits without trial—a factor presupposed in the balance of competing interests struck by our prior cases—requires a clarification of the standards of pleading and proof to be applied in cases involving immunity claims by high officials of the federal government. Under the Federal Rules of Civil Procedure disputed questions of fact ordinarily may not be decided on motions for summary judgment.²³ Applying this standard in suits against public officials, courts have hesitated to grant summary judgment even in cases in which plaintiffs have offered little or no evidence controverting a defendant's affidavits.²⁴

action
²² The importance of this consideration hardly needs emphasis. This Court has noted the risk imposed upon political officials who must defend their motives before a jury. See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U. S. 391, 405 (1979); *Tenney v. Brandhove*, 341 U. S. 367, 377 (1951). As the Court observed in *Tenney*, "In times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed." 341 U. S., at 378. It is for this among other reasons that *Butz*, *supra*, admonished that insubstantial suits should "not proceed to trial, but can be terminated on a properly supported motion for summary judgment." 438 U. S., at 508.

²³ Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether summary judgment is proper, a court ordinarily must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party. *E. g.*, *United States v. Diebold, Inc.*, 369 U. S. 654, 655 (1962).

²⁴ Under a standard of qualified immunity, an official will not be liable for

Because an officials' subjective "good faith" is a question of fact, some courts have regarded this issue as inherently requiring resolution by a jury,²⁶ and sometimes have found a plaintiff's unsupported averment sufficient to force a trial.²⁷ In short, the balance contemplated by *Butz* has not proved

damages unless he "knew or reasonably should have known that the action he took within his sphere of official responsibility" was unconstitutional or he "took the action with the malicious intention to cause a deprivation of constitutional rights or other injury. . . ." *Wood v. Strickland*, 420 U. S. 308, 322 (1975). Cases involving immunity claims under this standard frequently present two distinct kinds of factual issues. The first kind is concerned with whether the alleged conduct actually occurred at all. For discussions of the requisites for establishing a "jury question" on this issue, see, e. g., *Hanrahan v. Hampton*, *supra*, 446 U. S., at 764-765 (Powell, J., dissenting); *Barker v. Norman*, 651 F. 2d 1107, 1122-1124 (CA5 1981). The second kind of issue is whether the conduct—assuming that it did occur—is entitled to the protections of good faith immunity. See, e. g., *Barker v. Norman*, *supra*, 651 F. 2d, at 1125-1127. In cases raising these questions, which are concerned with subjective perceptions and motives, it has proved especially difficult to avoid the costs—in time, money, and anxiety—of trial before a jury. As Judge Gesell explained in his concurring opinion in *Halperin v. Kissinger*, *supra*, 606 F. 2d, at 1214:

"It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient. In short, if these standards are those to be followed in these cases, trial judges will almost automatically have to send such cases to full trials on the merits."

For cases in which qualified immunity was granted only after trial or evidentiary hearings, see *Knell v. Bensinger*, 522 F. 2d 720 (CA7 1975); *Ohland v. City of Montpelier*, 467 F. Supp. 324 (D. Vt. 1979).

²⁶ E. g., *Landrum v. Moats*, 576 F. 2d 1320, 1329 (CA8 1978); *Duchessne v. Sugarman*, 566 F. 2d 817, 832-833 (CA2 1977).

²⁷ See *Clark v. United States*, 481 F. Supp. 1086, 1092-1093 n. 5 (S.D. N.Y. 1979), appeal dismissed in part and stayed in part, 624 F. 2d 3, 4 (CA2 1980) (mere pleading of malice sufficient to prevent dismissal on immunity ground); *Schuck*, *supra*, at 324-325.

in the absence of

workable in practice without clarification by this Court of the applicable evidentiary standards.²⁹

B

In *Gomez v. Toledo*, 446 U. S. 635 (1980), this Court held in the context of a suit under 42 U. S. C. § 1983 that a claim of "good faith" immunity is an affirmative defense that must be pleaded by the defendant.³⁰ But we did not reach the question of the burden of proof on this issue. See *ibid.*, at 642 (REHNQUIST, J., concurring). Petitioners urge that the burden of showing lack of good faith should be placed on the plaintiff. Further, where a defendant—by affidavits or otherwise—effectively controverts a plaintiff's factual averments, petitioners argue that the plaintiff should be required to make some substantial evidentiary showing in order to survive a motion for summary judgment. We are generally in accord with these views.

In order to provide an effective barrier to trial of claims lacking in substance, we believe that a high federal official's claimed entitlement to qualified immunity must be given substantial weight, not only at trial but on a motion for summary judgment.³¹ Consistently with this view, we hold that a defendant's assertion of this defense shifts the burden to the

²⁹Cf. *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503, 526 (1969) (Harlan, J., dissenting) (translation of constitutional principles into "workable constitutional rule[s]" sometimes may require adjustment of burdens of pleading and proof).

³⁰Although *Gomez* presented the question in the context of an action under § 1983, the Court's analysis indicates that "immunity" must also be pleaded as a defense in actions under the Constitution and laws of the United States. See 446 U. S., at 640.

³¹Cf. *Halperin v. Kissinger*, *supra*, 606 F. 2d, at 1215 (Gesell, J., concurring):

"In order to give the immunity doctrine some genuine force and effect, it appears to me that a plaintiff should be required to make a stronger showing than the Court's opinion requires on the immunity question before being permitted to proceed to trial. I would hold that the plaintiff must

plaintiff to prove by a preponderance of the evidence that the official did not act either in objective or subjective good faith. Moreover, to effectuate our admonition that insubstantial claims should be rejected without resort to trial, we think a plaintiff must show some capacity to meet this burden—as well as to establish all other elements of his affirmative case—in order to survive a motion for summary judgment. Thus, at the summary judgment stage in a case involving immunity claims by high federal officials, we think it appropriate to require a showing of evidence by the plaintiff—with allowance for the uncertainty of developments at trial—from which a rational factfinder reasonably could conclude that the “preponderance of the evidence” standard was satisfied.

In allocating the burden of proof to the plaintiff after an immunity defense is raised, we protect the public interest in the effective administration of government—an interest that indisputably is threatened when insubstantial claims against officials result in protracted and vexatious litigation. Requiring proof of substantiality will not deter or frustrate meritorious claims. The requirements for pleading, as for proof at trial, remain the same. If the defendant advances the defense of good faith immunity, the plaintiff will retain access to reasonable discovery to aid in carrying his burden. And he need not prove the merits of his case on a motion for summary judgment, but only make a showing of substantiality adequate to justify the cost—both public and private—of subjecting a high federal official to trial.

establish after the completion of discovery and before the trial commences, not merely the existence of a genuine dispute as to some material issue of fact but also, by the preponderance of the evidence or through clear and convincing evidence, that the official failed to act with subjective or objective good faith.”

See also Freed, Executive Official Immunity for Constitutional Violations: An Analysis and a Critique, 72 Nw. L.R. 526, 563 (1977) (“the better rule would be to require the plaintiff to establish subjective bad faith or malice and the defendant to establish the reasonableness of his action”).

C

In this case petitioners have asked us to hold that the respondent's pre-trial showings were insufficient to survive their motion for summary judgment. We think it appropriate, however, to remand the case to the District Court, for its reconsideration of this issue in light of this opinion.³¹ The trial court is more familiar with the record so far developed and also is better situated to make any such further findings as may be necessary.

VI

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

So ordered.

³¹ Petitioners also have urged us, prior to the remand, to rule on the legal sufficiency of respondent's "implied" causes of action under 5 U. S. C. § 7211 and 18 U. S. C. § 1505 and his *Bivens* claim under the First Amendment. We do not wish to intimate that either the statutory, cf. *Texas Industries, Inc. v. Radcliffe Materials*, 451 U. S. —, — (May 28, 1981) (controlling question is whether Congress affirmatively intended to create a damages remedy), or the *Bivens* question, cf. *Bush v. Lucas*, 647 F. 2d 573, 576 (CA5 1981), affirming on remand 598 F. 2d 968 (CA5 1979) (holding that the "unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a *Bivens* remedy"), is insubstantial. But, having taken jurisdiction of the case in order to resolve the immunity question under the collateral order doctrine, we think it appropriate to leave these issues for fuller consideration by the District Court and, if necessary, by the Court of Appeals.

only

Therefore

As in *Nixon v. Fitzgerald*, ante, we took juris-

5, 10, 13, 14, 15,

18, 18a, 19, 19a, 19b, 20

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SUPREME COURT OF THE UNITED STATES

No. 80-945

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS v. A. ERNEST FITZGERALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March —, 1982]

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.

I

In this suit for civil damages petitioners Bryce Harlow and Alexander Butterfield are alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the respondent A. Ernest Fitzgerald. Respondent avers that petitioners entered the conspiracy in their capacities as senior White House aides to former President Richard M. Nixon. As the alleged conspiracy is the same as that involved in *Nixon v. Fitzgerald*, *ante*, the facts need not be repeated in detail.

Respondent claims that Harlow joined the conspiracy in his role as the Presidential aide principally responsible for congressional relations.¹ At the conclusion of discovery the

¹ Harlow held this position from the beginning of the Nixon Administration on January 20, 1969 through November 4, 1969. On that date he was designated as Counsellor to the President, a position accorded Cabinet status. He served in that capacity until December 9, 1970, when he returned to private life. Harlow later resumed the duties of Counsellor for the pe-

supporting evidence remained inferential. As evidence of Harlow's conspiratorial activity respondent relies heavily on a series of conversations in which Harlow discussed Fitzgerald's dismissal with Air Force Secretary Robert Seamans.² The other evidence most supportive of Fitzgerald's claim consists in a recorded conversation in which the President later voiced a tentative recollection that Harlow was "all for canning" Fitzgerald.³

Disputing Fitzgerald's contentions, Harlow argues that exhaustive discovery has adduced no direct evidence of his in-

riod from July 1, 1973 through April 14, 1974. Respondent appears to allege that Harlow continued in a conspiracy against him throughout the various changes of official assignment.

²The record reveals that Secretary Seamans called Harlow in May, 1969, to inquire about likely congressional reaction to a draft reorganization plan that would cause Fitzgerald's dismissal. According to Seamans' testimony, "we [the Air Force] didn't ask [Harlow] to pass judgment on the action itself. We just asked him what the impact would be in the relationship with the Congress." App. 153, 164-165 (Deposition of Robert Seamans). Through an aide Harlow responded that "this was a very sensitive item on the Hill and that it would be [his] recommendation that [the Air Force] not proceed to make such a change at that time." *Id.*, at 152. But the Air Force persisted. Seamans spoke to Harlow on at least one subsequent occasion during the spring of 1969. The record also establishes that Secretary Seamans called Harlow on November 4, 1969, shortly after the public announcement of Fitzgerald's impending dismissal, and again in December 1969. See App. 186.

³See App. 284. (Transcript of a Recorded Conversation between Richard Nixon and Ronald Ziegler, February 26, 1973). In a conversation with the President on January 31, 1973, John Ehrlichman also recalled that Harlow had discussed the Fitzgerald case with the President. See App. 218-221. (Transcript of Recorded Conversation between Richard Nixon and John Ehrlichman, January 31, 1973). In the same conversation the President himself asserted that he had spoken to Harlow about the Fitzgerald matter, see *ibid.*, at 218, but the parties continue to dispute whether Mr. Nixon—at the most relevant moments in the discussion—was confusing Fitzgerald's case with that of another dismissed employee. The President explicitly stated at one point that he previously had been confused. See *ibid.*, at 220.

volvement in any wrongful activity.⁴ Petitioner avers that Secretary Seamans advised him that considerations of efficiency required Fitzgerald's removal by a reduction in force, despite anticipated adverse congressional reaction. Harlow asserts he had no reason to believe that a conspiracy existed. He contends that he took all his actions in good faith.⁵

Petitioner Butterfield also is alleged to have entered the conspiracy not later than May 1969. Employed as Deputy Assistant to the President and Deputy Chief of Staff to H.R. Haldeman,⁶ Butterfield circulated a White House memorandum in that month in which he claimed to have learned that Fitzgerald planned to "blow the whistle" on some "shoddy purchasing practices" by exposing these practices to public view.⁷ Fitzgerald characterizes this memorandum as evi-

⁴ See Defendants Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment (Memorandum in Support of Summary Judgment), at 7 (Civil No. 74-178, Feb. 12, 1980).

⁵ In support of his version of events Harlow relies particularly on the deposition testimony of Air Force Secretary Seamans, who stated that he regarded abolition of Fitzgerald's position as necessary "to improve the efficiency" of the Financial Management Office of the Air Force and that he never received any White House instruction regarding the Fitzgerald case. App. 159-160. Petitioner also disputes the probative value of Richard Nixon's recorded remark that Harlow had supported Fitzgerald's firing. Harlow emphasizes the tentativeness of the President's statement. To the President's query whether Harlow was "all for canning [Fitzgerald], wasn't he?", White House Press Secretary Ronald Ziegler in fact gave a negative reply: "No, I think Bryce may have been the other way." App. 284. The President did not respond to Ziegler's comment.

⁶ The record establishes that Butterfield worked from an office immediately adjacent to the oval office. He had almost daily contact with the President until March 1973, when he left the White House to become Administrator of the Federal Aviation Administration.

⁷ App. 274. Butterfield reported that this information had been referred to the Federal Bureau of Investigation. In the memorandum Butterfield reported that he had received the information "by word of several mouths, but allegedly from a senior AFL-CIO official originally Evidently, Fitzgerald attended a recent meeting of the National Democratic

dence that Butterfield had commenced efforts to secure Fitzgerald's retaliatory dismissal. As evidence that Butterfield participated in the conspiracy to conceal his unlawful discharge and prevent his reemployment, Fitzgerald relies heavily on communications between Butterfield and Haldeman in December 1969 and January 1970. After the President had promised at a press conference to inquire into Fitzgerald's dismissal, Haldeman solicited Butterfield's recommendations. In a subsequent memorandum emphasizing the importance of "loyalty," Butterfield counselled against offering Fitzgerald another job in the Administration at that time.⁶

For his part, Butterfield denies that he was involved in any decision concerning Fitzgerald's employment status until Haldeman sought his advice in December 1969—more than a month after Fitzgerald's termination had been scheduled and announced publicly by the Air Force. Butterfield states that he never communicated his views about Fitzgerald to any official of the Defense Department. He argues generally that nearly eight years of discovery has failed to turn up any evidence that he caused injury to Fitzgerald.⁷

Together with their codefendant Richard Nixon, petitioners Harlow and Butterfield moved for summary judgment on February 12, 1980. In denying the motion the District Court upheld the legal sufficiency of Fitzgerald's *Bivens* claim under the First Amendment and his "inferred" statu-

Coalition and, while there, revealed his intentions to a labor representative who, fortunately for us, was unsympathetic." *Ibid.*

⁶ App. 99-100, 180-181. This memorandum was not sent to the Defense Department.

⁷ See Memorandum in Support of Memorandum in Support of Summary Judgment, *supra*, at 26. The history of Fitzgerald's litigation is recounted in *Nixon v. Fitzgerald*, *ante*. Butterfield was named as a defendant in the initial civil action filed by Fitzgerald in 1974. Harlow was named for the first time in respondent's Second Amended Complaint of July 5, 1978.

tory actions under 5 U. S. C. § 7211 and 18 U. S. C. § 1505.¹⁰ The court found that there were genuine issues of disputed fact remaining for resolution at trial. It also ruled that petitioners were not entitled to absolute immunity. Pet. for Cert. 1a-3a.

Independently of former President Nixon, petitioners invoked the collateral order doctrine and appealed the denial of their immunity defense to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed the appeal without opinion. Pet. for Cert. 11a-12a. Never having determined the immunity available to the senior aides and advisers of the President of the United States, we granted certiorari. 452 U. S. 957 (1981).¹¹

II

As we reiterated today in *Nixon v. Fitzgerald*, *ante*, 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. To officials whose special functions or constitutional

¹⁰ Neither of these statutes expressly confers a private right to sue for relief in damages. The first, 5 U. S. C. § 7211 (Supp. III 1979), provides generally that "The right of employees . . . to . . . furnish information to either House of Congress, or to a committee or a Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. See note —, *infra*.

¹¹ As in *Nixon v. Fitzgerald*, *ante*, our jurisdiction has been challenged on the basis that the District Court's order denying petitioners' claim of absolute immunity was not an appealable final order and that the Court of Appeals' dismissal of petitioners' appeal establishes that this case was never "in" the Court of Appeals within the meaning of 28 U. S. C. § 1254. As the discussion in *Nixon* establishes our jurisdiction in this case as well, we need not consider those challenges in this opinion.

Neither expressly creates a private right to sue for damages. Petitioners argue that the District Court erred in finding that a private cause of action could be inferred under either statute, and that "special factors" present in the context of the federal employer-employee relationship preclude the recognition of respondent's *Bivens* action under the First Amendment. The legal sufficiency of respondent's asserted causes of action is not, however, a question that we view as properly presented for our decision in the present posture of this case. See note 3⁷ *infra*.

status requires complete protection from suit, we have extended the defense of "absolute immunity." The absolute immunity of legislators, in their legislative functions, see, e. g., *Eastland v. United States Servicemen's Fund*, 421 U. S. 491 (1975), and of judges, in their judicial functions, see, e. g., *Stump v. Sparkman*, 435 U. S. 349 (1978), now is well settled. Our decisions also have extended absolute immunity to certain officials of the Executive branch. These include prosecutors and similar officials, see *Butz v. Economou*, 438 U. S. 478, 508-512 (1978), executive officers engaged in adjudicative functions, *id.*, at 513-517, and the President of the United States, see *Nixon v. Fitzgerald*, *ante*.

For executive officials in general, however, our cases make plain that qualified immunity represents the norm. In *Scheuer v. Rhodes*, 416 U. S. 232 (1974), we acknowledged that high officials require greater protection than those with less complex discretionary responsibilities. Nonetheless, we held that a governor and his aides could receive the requisite protection from qualified or good-faith immunity. *Id.*, at 247-248. In *Butz v. Economou*, *supra*, we extended the approach of *Scheuer* to high federal officials of the Executive branch. Discussing in detail the considerations that also had underlain our decision in *Scheuer*, we explained that the recognition of a qualified immunity defense for high executives reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, 438 U. S., at 504-505, but also "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Id.*, at 506. Without discounting the adverse policy consequences of denying high officials an absolute immunity from private lawsuits alleging constitutional violations—consequences found sufficient in *Spalding v. Vilas*, 161 U. S. 483 (1896), and *Barr v. Matteo*, 360 U. S. 564 (1959), to warrant extension to such officials of absolute

immunity from suits at common law—we emphasized our expectation that insubstantial suits need not proceed to trial:

“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 *Scheur* 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.” 438 U. S., at 507-508 (citations omitted).

Butz continued to acknowledge that the special functions of some officials might require absolute immunity. But the Court held that “federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.” *Id.*, at 506. This we reaffirmed today in *Nixon v. Fitzgerald*, *ante*, at —.

III

A

Petitioners argue that public policy requires a blanket extension of absolute immunity to Presidential aides. In deciding this claim we do not write on an empty page. In *Butz v. Economou*, *supra*, the Secretary of Agriculture—a Cabinet official directly accountable to the President—asserted a defense of absolute official immunity from suit for civil damages. We rejected his claim. In so doing we did not question the power or the importance of the Secretary’s office.

Nor did we doubt the importance to the President of loyal and efficient subordinates in executing his duties of office. Yet we found these factors, alone, to be insufficient to justify absolute immunity. "[T]he greater power of [high] officials," we reasoned, "affords a greater potential for a regime of lawless conduct." 438 U. S., at 506. Damages actions against high officials were therefore "an important means of vindicating constitutional guarantees." *Ibid.* Moreover, we found that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials," *id.*, at 504.

Having decided in *Butz* 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.

B

In disputing the controlling authority of *Butz*, petitioners rely on the principles developed in *Gravel v. United States*, 408 U. S. 606 (1972).¹² In *Gravel* we endorsed the view that "it is literally impossible . . . for Members of Congress to per-

¹²Petitioners also claim support from other cases that have followed *Gravel* in holding that Congressional employees are derivatively entitled to the legislative immunity provided to United States Senators and Representatives under the Speech and Debate Clause. See *Eastland v. United States Servicemen's Fund*, 421 U. S. 491 (1975); *Doe v. McMillan*, 412 U. S. 306 (1973).

form 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. . . ." *Id.*, at 616-617. 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. *Id.*, at 621-622.

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 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. In *Gravel*, for example, we emphasized that Senators and their aides were absolutely immune only when performing "acts legislative in nature," and not when taking other acts even "in their

¹See U. S. Const., Art. 2, §2 ("The President . . . may require the Opinion, in writing, or the principal Officer in each of the executive Departments, upon any Subject relating to the duties of their respective Offices. . . .").

official capacity." 408 U. S., at 625. See *Hutchinson v. Proxmire*, 443 U. S. 111, 125-133 (1979). Our cases involving judges¹⁴ and prosecutors¹⁵ have followed a similar line. The undifferentiated extension of absolute "derivative" immunity 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.¹⁶

C

Petitioners also assert an entitlement to immunity based on the "special functions" of White House aides. This form of argument is in accord with the analytical approach of our cases. 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 inter-

¹⁴ See, e. g., *Supreme Court of Virginia v. Virginia Consumers Union*, 446 U. S. 719, 731-737 (1980); *Stump v. Sparkman*, *supra*, 438 U. S., at 362.

¹⁵ In *Imbler v. Pachtman*, 424 U. S. 409, 430-431 (1973), this Court reserved the question whether absolute immunity would extend to "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer." Since that time the courts of appeals generally have ruled prosecutors do not enjoy absolute immunity for acts taken in those capacities. See, e. g., *Mancini v. Lester*, 630 F. 2d 990, 992 (CA3 1980); *Forsyth v. Kleindeinst*, 599 F. 2d 1203, 1213-1214 (CA3 1979). This Court at least implicitly has drawn the same distinction in extending absolute immunity to executive officials when they are engaged in quasi-prosecutorial functions. See *Butz v. Economou*, *supra*, 438 U. S., at 515-517.

¹⁶ Our decision today in *Nixon v. Fitzgerald*, *ante*, in no way abrogates this general rule. As we explained in that opinion, the recognition of absolute immunity for all of a President's acts in office derives in principal part from factors unique to his constitutional station. Suits against other officials—including Presidential aides—generally do not invoke the special separation-of-powers considerations implicated by suits against the President himself. See *ante*, at —.

to the same
extent as

est.¹⁷ But a "special functions" rationale does not warrant a blanket recognition of absolute immunity for all Presidential aides in the performance of all their duties. This conclusion too follows from our decision in *Butz*, which establishes that an executive official's claim to absolute immunity must be justified by reference to the public interest in the special functions of his office, not the mere fact of high station.¹⁸

Butz also identifies the location of the burden of proof. The burden of justifying absolute immunity rests on the official asserting the claim. 438 U. S., at 506. We have not of course had occasion to identify how a Presidential aide might carry this burden. But the general requisites are familiar in our cases. 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.¹⁹ He then must demon-

¹⁷ Cf. *United States v. Nixon*, 418 U. S. 683, 710-711 (1974) ("[C]ourts have traditionally shown the utmost deference to Presidential responsibilities" for foreign policy and military affairs, and claims of privilege in this area would receive a higher degree of deference than invocations of "a President's generalized interest in confidentiality."); *Katz v. United States*, 389 U. S. 347, 364 (1967) (White, J., concurring) ("We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.") (emphasis added).

¹⁸ *Gravel, supra*, points to a similar conclusion. We fairly may assume that some aides are assigned to act as Presidential "alter egos," *Gravel, supra*, 408 U. S., at 616-617, in the exercise of functions for which absolute immunity is "essential for the conduct of the public business," *Butz, supra*, 438 U. S., at 507. Cf. *Gravel, supra*, 408 U. S., at 620 (derivative immunity extends only to acts within the "central role" of the Speech and Debate Clause in permitting free legislative speech and debate). By analogy to *Gravel*, a derivative claim to Presidential immunity would be strongest in such "central" Presidential domains as foreign policy and national security, in which the President could not discharge his singularly vital mandate without delegating functions nearly as sensitive as his own.

¹⁹ Here as elsewhere the relevant judicial inquiries would encompass con-

strate that he was in fact discharging the protected function when he performed the act for which liability is asserted.²⁰

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." *Butz, supra*, 438 U. S., at 506. 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. We do not, however, foreclose the possibility that petitioners, on remand, could satisfy the standards properly applicable to their claims.

IV

Even if they cannot establish that their official functions require absolute immunity, petitioners assert that public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial. We agree.

A

As we recognized today in *Nixon v. Fitzgerald, ante*, at —, 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

siderations of public policy, the importance of which should be confirmed either by reference to the common law or, more likely, our constitutional heritage and structure. See *Nixon v. Fitzgerald, ante*, at —.

²⁰The need for such an inquiry is implicit in *Butz v. Economou, supra*, 438 U. S., at 508–517; see *Imbler v. Pachtman*, 424 U. S. 409, 430–431 (1976). Cases involving immunity under the Speech and Debate Clause have inquired explicitly into whether particular acts and activities qualified for the protection of the Clause. See, e. g., *Hutchinson v. Proxmire, supra*; *Doe v. McMillan*, 412 U. S. 306 (1973); *Gravel v. United States, supra*.

for damages may offer the only realistic avenue for vindication of constitutional guarantees. *Butz v. Economou*, *supra*, 438 U. S., at 506; see *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 410 (1971) ("For people in Bivens' shoes, it is damages or nothing."). It is this recognition that has required the denial of absolute immunity to most public officers. 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 the society as a whole.²¹ These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and—perhaps most important of all—the deterrence of able citizens from the acceptance of public office.

In identifying qualified immunity as the best attainable accommodation of competing values, in *Butz*, *supra*, 438 U. S., at 507-508, as in *Scheuer*, *supra*, 416 U. S., at 245-248, we relied on the assumption that this standard would permit "[i]nsubstantial lawsuits [to] be quickly terminated." *Butz*, *supra*, 438 U. S., at 507-508; see *Hanrahan v. Hampton*, 446 U. S. 754, 765 (POWELL, J., concurring in part and dissenting in part).²² Yet petitioners advance persuasive arguments that the dismissal of insubstantial lawsuits without trial—a

²¹ See generally Schuck, *Swing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup. Ct. Rev. 281, 324-327.

²² The importance of this consideration hardly needs emphasis. This Court has noted the risk imposed upon political officials who must defend their actions and motives before a jury. See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U. S. 391, 405 (1979); *Tenney v. Brandhove*, 341 U. S. 367, 377-378 (1951). As the Court observed in *Tenney*, "In times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed." 341 U. S., at 378. It is for this among other reasons that *Butz*, *supra*, admonished that insubstantial suits should "not proceed to trial, but can be terminated on a properly supported motion for summary judgment." 438 U. S., at 508.

Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties. *Gregoire v. Biddle*, 177 F.2d 579, 581 (CA2 1949). See *Nixon v. Fitzgerald*, *ante*, at ____.

factor presupposed in the balance of competing interests struck by our prior cases—requires an adjustment of the ~~substantive and evidentiary~~ standards established by our decisions.

"good faith"

B

Qualified or "good faith" immunity is an affirmative defense that must be pleaded by a defendant official. *Gomez v. Toledo*, 446 U. S. 635 (1980).²³ 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." *Wood v. Strickland*, 420 U. S. 308, 320 (1975). The subjective component refers to "permissible intentions." *Ibid.* Characteristically the Court has defined these elements by identifying the circumstances in which qualified immunity would *not* be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if 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.* . . ." *Id.*, at 321–322 (emphasis added).²⁴

²³ Although *Gomez* presented the question in the context of an action under § 1983, the Court's analysis indicates that "immunity" must also be pleaded as a defense in actions under the Constitution and laws of the United States. See 446 U. S., at 640. *Gomez* did not decide which party bore the burden of proof on the issue of good faith. *Id.*, at 642 (REHNQUIST, J., concurring).

²⁴ In *Wood* the Court explicitly limited its holding to the circumstances in which a school board member, "in the specific context of school discipline," 420 U. S., at 321, would be stripped on claimed immunity in an action under § 1983. Subsequent cases, however, have quoted the *Wood* formulation as a general statement of the qualified immunity standard. See, e. g., *Procunier v. Navarette*, 434 U. S. 555, 562–563, 566 (1978), quoted in

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.²⁵ Yet an official's subjective good faith has been considered to be a question of fact, which some courts apparently have regarded as inherently requiring resolution by a jury.²⁶

Viewed in the context of *Butz*'s attempted balancing of competing values, substantial costs attend the litigation of the subjective good faith of high officials of the Executive Branch. The duties of these officers often require decisions on controversial issues of gravest importance, in an environment in which views inevitably are affected by loyalty, ideology, and emotion. This environment in part explains why questions of intent so rarely can be decided by summary judgment. Yet it also frames a background in which there often is no clear end to the evidence that may be probative of subjective intent. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous officials. Litigation burdens of this kind

Question of good faith is ~~not~~ "peculiarly within the jury's province";

(good faith "is dependent on motivation and conduct ... as established at trial") (emphasis added);

Baker v. McCollan, 443 U. S. 137, 139 (1979).

²⁵The Rule states that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether summary judgment is proper, a court ordinarily must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party. *E. g.*, *Potter v. Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962).

²⁶*E. g.*, *Landrum v. Moats*, 576 F. 2d 1320, 1329 (CA8 1978); *Duchesne v. Sugarman*, 566 F. 2d 817, 833 (CA2 1977) (cf. *Hutchinson v. Proxmire*, 443 U. S. 111, 120 n. 9 (1979) (questioning whether the existence of "actual malice," as an issue of fact, may properly be decided on summary judgment in a suit alleging libel of a public figure)).

The two-pronged standard as phrased in *Wood* actually is somewhat redundant in many if not in most cases. If the defendant neither knew nor should have known that his conduct would violate the plaintiff's constitutional rights, it follows that the defendant could not have acted with a malicious intent to cause a deprivation of constitutional rights of which he knew nothing. The subjective standard thus would be meaningful only in a case in which a defendant acted without knowing this his conduct violated the Constitution, but intending to inflict "other [actionable] injury."

not only can distract officials from the performance of their duties.²⁷ At least in the case of such high officials as the President's closest aides, separation-of-powers concerns also require that such inquiries into executive decisionmaking should not be undertaken lightly.²⁸

²⁷ As Judge Gesell observed in his concurring opinion in *Kissinger v. Halperin*, 606 F. 2d 1192, 1214 (CA DC 1979), aff'd by an equally divided court, 452 U. S. 713 (1981):

"We should not close our eyes to the fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials based on alleged constitutional torts. Each such suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discovery [sic] is wide-ranging, time-consuming, and not without considerable cost to the officials involved. It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient [to force a trial] . . . The effect of this development upon the willingness of individuals to serve their country is obvious."

²⁸ See *Nixon v. Fitzgerald*, ante, at —; *Nixon v. Administrator of General Services Administration*, 433 U. S. 425, 433 (1977); *United States v. Nixon*, 418 U. S. 688, 711-712 (1974). As the Court recognized in *United States v. Nixon*:

"A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."

418 U. S., at 705-706, 708. Many of the policy considerations implicated by Presidential communications would apply with nearly equal force to communications among Presidential aides and other high Executive officials. The separation-of-powers concerns are different in the two cases,

Insert
Attached
"Rider A"
here

As we affirmed in *Nixon v. Fitzgerald*, *ante*, there are situations in which sufficiently compelling justifications exist. In the case of private suits for damages, however, we conclude today that bare allegations of malice should not suffice either to subject high federal officials to the costs of trial or to license broad-reaching discovery. Consistently with the balance at which we aimed in *Butz*, we therefore hold that at least high executive officials are shielded from liability for civil damages insofar as their conduct does not violate "settled, indisputable" legal rights of which they reasonably should have known. *Wood v. Strickland*, *supra*, 420 U. S., at 321.²⁹ Absent a clear congressional decision to the contrary, we conclude that public policy will not support the cost of conditioning their immunity on proof of subjective intent.³⁰

being less weighty where the President personally is not involved. As commentators have observed, however, the "separation of powers" is "a 'political doctrine' and not a technical rule of law." Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempt Cases in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1014 (1924) (footnote omitted). Even where the separation-of-powers doctrine imposes no absolute barrier to judicial functions intruding on the functioning of the Executive Branch, the doctrine does require a judicial consideration of the constitutional interests at stake in cases of particular kinds. See *Nixon v. Fitzgerald*, *ante*, at —; *Nixon v. Administrator of General Services Administration*, *supra*, 433 U. S., at 443 (1977); *United States v. Nixon*, *supra*, 418 U. S., at 711-712 (1974).

²⁹This case involves no issue concerning the elements of the immunity defense for lower level officials, nor does it present any question of the immunity available to state officials sued for constitutional violations under § 1983. We do not purport to resolve questions that might be framed by cases not properly before us. As we recognized in *Scheur v. Rhodes*, *supra*, 416 U. S., at 247, the qualified immunity defenses possessed by different officials should be determined by reference to "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based."

³⁰This case involves no claim that Congress has expressed its intent to impose "no fault" tort liability on high federal officials for violations of par-

Reliance on the objective reasonableness of an official's conduct, as measured by reference to settled, indisputable law,³¹ should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. Charged with decisionmaking under pressures of time and limits of information, not every official fairly could be held responsible for areas of the law remote from his experience or duties. Nor is it reasonable to expect every such official to be familiar with the most recent judicial developments. On summary judgment, the judge appropriately may determine what the law was at the time the action occurred ~~and often~~ may be able to decide what a particular high official reasonably could be expected to have known about it.³²

and in most cases

By defining the limits on a high official's qualified immunity solely in "objective" terms, we provide no license to lawless conduct. The public interest in deterrence of constitutional violations and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. ³³ Where an official knows that his conduct will violate constitutional rights, he should be made to hesitate. Where his duties legitimately require action in which established rights are not implicated—even if the action potentially is harmful to someone that the official dislikes—the public interest frequently may be served better by fearless

ticular statutes or the Constitution.

³¹ As in *Procunier v. Navarette*, 434 U. S. 555, 565 (1978), we need not define here the circumstances under which "the state of the law" should be "evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court."

³² Cf. *Procunier v. Navarette*, *supra*, 434 U. S., at 565 (footnote omitted) ("Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for established law that their conduct 'cannot reasonably be characterized as being in good faith.'")

(Footnote 33 appears on the following page)

Footnote 33:

A victim of wrongful behavior by a public official frequently may be able to obtain compensation by means other than a private suit for damages against the individual wrongdoer in a federal court. In this case, for example, Fitzgerald invoked civil service remedies that resulted in a judgment entitling him to reinstatement and backpay. See Decision of Civil Service Commission Chief Appeals Examiner: Decision on the Appeal of A. Ernest Fitzgerald (Sept. 18, 1973). Where relief is available from the Government, as under the Civil Service Act, no immunity defense generally will be recognized. Even under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671-2680, which provides certain exemptions from Government liability, including one for "discretionary functions," see Dalehite v. United States, 346 U.S. 15 (1953), this Court has held that "the very purpose of [Congress] was to waive the Government's traditional all-encompassing immunity" and that there is "no justification for this Court to read exemptions into the Act beyond those provided by Congress," Rayonier v. United States, 352 U.S. 315, 319, 320 (1957).

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and unhesitating action.^A

C

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In addition to the question of good faith, cases involving claims of qualified immunity frequently involve disputes over whether the official's allegedly wrongful actions ever occurred at all.^A Where a defendant—by affidavits or otherwise—effectively controverts a plaintiff's factual averments, petitioners argue that the plaintiff should be required to make some substantial showing in order to survive a motion for summary judgment by a high federal official. Consistent

with our view that a claim of immunity should provide an effective barrier to trial of claims lacking in substance, we agree. At the summary judgment stage in a case involving immunity claims by high federal officials, we think it appropriate to require a showing of evidence by the plaintiff—with allowance for the uncertainty of developments at trial—from which a rational factfinder reasonably could conclude that the "preponderance of the evidence" standard was satisfied.^B

Requiring this proof of substantiality will not deter or frustrate meritorious claims. The requirements for pleading, as for proof at trial, remain unchanged. Further, the plaintiff

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^A We emphasize that we hold only that a high federal official is shielded against liability for civil damages arising from actions within the scope of his duties and in "objective" good faith. We express no view as to the conditions in which injunctive or declaratory relief might be available.

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^A For discussions of the requisites for establishing a "jury question" on this issue, see, e. g., *Haarhan v. Hampton*, *supra*, 446 U. S., at 764-765 (POWELL, J., dissenting); *Barker v. Norman*, 651 F. 2d 1107, 1122-1124 (CA5 1981).

^B Cf. *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503, 526 (1969) (Harlan, J., dissenting) (translation of constitutional principles into "workable constitutional rule[s]" sometimes may require adjustment of rules of proof and pleading); *Halperin v. Kissinger*, *supra*, 516 F. 2d, at 1215 (Gesell, J., concurring) (summary judgment standards should be adjusted to "give the immunity doctrine some genuine force and effect").

In Butz we concluded that absolute immunity is unnecessary to protect the public interest in "encouraging the vigorous exercise of official authority", 43⁸ U.S. at 506, because we believed that qualified immunity would adequately shield officials from liability for good faith mistakes. We assumed that such immunity would prove "workable". There are indications, however, that some District Courts have not understood our admonition in Butz that suits against high public officials should not proceed to trial in the absence of a showing of substantiality.^A We reiterate this admonition. A

36. See Hanrahan v. Hampton, supra, 446 U.S., at 763-766 (Powell, J., dissenting in part); Schuck, supra, 1980 Sup.

plaintiff retains, of course, access to reasonable discovery to aid in carrying his burden. And he need not prove the merits of his case on a motion for summary judgment. } *end.* But there should be a showing of sufficient substantiality to justify the costs - both public and private - of subjecting officials to protracted trials when it is evident at the summary judgment stage that the claims are insubstantial.

(Footnote continued)

Ct. Rev., at 324-327; cf. Halperin v. Kissinger, supra, 606 F.2d, at 1214-1215 (Gesell. J., concurring) (quoted at note 27 supra). }

retains access to reasonable discovery to aid in carrying his burden. And he need not prove the merits of his case on a motion for summary judgment, but only make a showing of substantiality adequate to justify the cost—both public and private—of subjecting a high federal official to trial.

D

[37] In this case petitioners have asked us to hold that the respondent's pre-trial showings were insufficient to survive their motion for summary judgment. We think it appropriate, however, to remand the case to the District Court, for its reconsideration of this issue in light of this opinion.* The trial court is more familiar with the record so far developed and also is better situated to make any such further findings as may be necessary.

V

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

So ordered.

[37] Petitioners also have urged us, prior to the remand, to rule on the legal sufficiency of respondent's "implied" causes of action under 5 U. S. C. § 7211 and 18 U. S. C. § 1505 and his *Bivens* claim under the First Amendment. We do not view either the statutory or the constitutional question as insubstantial. Cf. *Texas Industries, Inc. v. Radcliff Materials*, 451 U. S. 630, 638-639 (1981) (1981) (controlling question in implication of statutory causes of action is whether Congress affirmatively intended to create a damages remedy); *Bush v. Lucas*, 647 F. 2d 573, 576 (CA5 1981), affirming on remand 598 F. 2d 958 (CA5 1979) (holding that the "unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a *Bivens* remedy"). As in *Nixon v. Fitzgerald*, ante, however, we took jurisdiction of the case only to resolve the immunity question under the collateral order doctrine. We therefore think it appropriate to leave these questions for fuller consideration by the District Court and, if necessary, by the Court of Appeals.

February 8, 1982

5

No. 80-945, Harlow and Butterfield v. Fitzgerald

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
on their acts in office.

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I

In this suit for civil damages petitioners Bryce
Harlow and Alexander Butterfield ^{are alleged to have} ~~stand accused~~ of
participation in a conspiracy to violate the
constitutional and statutory rights of the respondent A.

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Ernest Fitzgerald. Respondent ^{avere} ~~alleges~~ that petitioners

alleged conspiracy is the same as that involved in No. 79-1738, Nixon v. Fitzgerald, the facts need not be repeated in detail.

Respondent alleges that Harlow entered the conspiracy 25
in his role as the presidential aide principally
responsible for congressional relations.¹ The record
reveals that Air Force Secretary Robert Seamans called
Harlow in May, 1969, to inquire about likely congressional
reaction to a draft reorganization plan that would cause 30
Fitzgerald's dismissal.² Harlow responded that "this was a
very sensitive item on the Hill and that it would be [his]
recommendation that [the Air Force] not proceed to make
such a change at that time."³ But the Air Force

¹Harlow held this position from the beginning of the Nixon Administration on January 20, 1969 through November 4, 1969. On that date he was designated as Counsellor to the President, a position accorded Cabinet status. He served in that capacity until December 9, 1970, when he returned to private life. Harlow later resumed the duties of Counsellor for the period from July 1, 1973 through April 14, 1974. Respondent appears to allege that Harlow continued in a conspiracy against ^{him} throughout the various changes of official assignment.

²According to Seamans' testimony, "we [the Air Force Department] didn't ask [Harlow] to pass judgment on the action itself. We just asked him what the impact

permitted

~~apparently did not understand this response as an~~ 35

~~attempted veto.~~ Seamans spoke to Harlow about

Fitzgerald's possible removal ^{on} at least two subsequent

occasions during the spring of 1969. The record also

establishes that the Secretary called Harlow on November

5, 1969, shortly after the Defense Department had 40

announced Fitzgerald's impending dismissal.⁴ On at least

one occasion, petitioner alleges, Harlow discussed the

Insert Fitzgerald matter directly with the President.⁵

Harlow's role--both in these and possibly other

discussions during this period--remains substantially in 45

dispute. Harlow cites the testimony of Air Force

Secretary Seamans, who has sworn that he "never received

any instruction" regarding Fitzgerald's dismissal.⁶ Yet

In his complaint--the factual allegations of which we must

accept as true for purposes of our decision--Fitzgerald 50

⁴See JA, at 186a.

⁵The evidence of this discussion consists entirely in a taped conversation, some three years later, in which Richard Nixon recollected that Harlow "was all for

... in these and possibly in other meetings - active conspirator

alleges that Harlow acted in concert with other officials to cause Fitzgerald's unlawful dismissal. In support of this allegation Fitzgerald relies heavily on a recorded conversation in which the President later voiced a tentative recollection that Harlow was "all for canning" 55

Fitzgerald.⁷

Harlow denies. Notes the President is entirely misinformed. Also Garrison

Petitioner Butterfield allegedly entered the conspiracy in his White House roles as Deputy Assistant to the President and Deputy Chief of Staff to H.R. Haldeman.⁸

In May 1969 Butterfield concededly circulated a White House memorandum in which he claimed to have learned that Fitzgerald planned to "blow the whistle" on some "shoddy purchasing practices" by leaking documents to a congressional committee.⁹ Butterfield reported that this information had been referred to the Federal Bureau of 65

⁷See JA, at 284a. Petitioners emphasized the tentativeness of the President's query. To the President's question White House press secretary Ronald Ziegler replied, "No, I think Bryce may have been the other way." Id. Nixon did not respond to Ziegler's remark.

⁸The record establishes that Butterfield worked from an office immediately adjacent to the oval office.

There is a repeat of m. 5

Investigation. Fitzgerald characterizes this memorandum as evidence that by May 1969 Butterfield had commenced efforts to secure Fitzgerald's retaliatory dismissal.

(Although Butterfield's role in the Fitzgerald dismissal also is much in controversy, for purposes of our decision

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we again must assume this allegation to be true.) ^{He says} The record also shows that White House chief of staff H.R.

see inferential support in evidence

Haldeman solicited Butterfield's recommendations in

December 1970, shortly after the President had promised at

a press conference to inquire into Fitzgerald's dismissal.

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Emphasizing the importance of "loyalty," Butterfield

counselled against offering Fitzgerald another job within

the Administration.¹⁰

Butterfield was named as a defendant in the initial civil complaint filed by respondent in the District Court

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in January 1974.¹¹ Harlow was first cited in the Second

¹⁰See JA, at 99a-100a, 180a. This memorandum was not sent to the Defense Department.

¹¹See Fitzgerald v. Seamans, 384 F. Supp. 688 (DDC 1974), aff'd in part and rev'd in part, 553 F.2d 220 (CA DC

Amended complaint of July 1978. Together with their
 codefendant Richard Nixon, petitioners both moved for
 summary judgment on February 12, 1980. In denying the
 motion the District Court upheld the legal sufficiency of
 Fitzgerald's Bivens claim under the First Amendment and
 his "inferred" statutory actions under 5 U.S.C. § 7211 and
 18 U.S.C. § 1505. The court also ruled that petitioner's
 were not absolutely immune from suit for civil damages.
 Independently of former President Nixon, petitioners
 invoked the collateral order doctrine and appealed the
 denial of ^{their} ~~absolute~~ ^{defense} immunity to the Court of Appeals for
 the District of Columbia Circuit. The Court of Appeals
 entered an order of dismissal.

Never having determined the scope of the immunity
 available to the senior aides and advisers of the
 President of the United States, we granted certiorari. ____

____ U.S. ____, ____ (1981).¹²

¹²As in *Nixon*, ante, our jurisdiction has been challenged on the basis that the District Court's order

2 categories:
absolute & classified.

7.

Absolute for
for the most part, however, executive
officials limited to qualified

II

As we reiterated today in Nixon v. Fitzgerald, ante, 100
our decisions consistently have recognized 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 to alleviate 105
potentially incapacitating fears of liability.

In Scheuer v. Rhodes, 416 U.S. 232 (1974), this Court
established the principle that the immunity available to
State executive officials generally should vary with the
complexity and sensitivity of their duties. 416 U.S., at 110

247. In Scheuer we noted that high executive officials
frequently must make decisions in an "atmosphere of
confusion, ambiguity, and swiftly moving events." Id., at

247. The range of required decisions may be "virtually
infinite," yet promptness essential. Vacillation entails 115

the risk that "action deferred will be futile or
constitute virtual abdication of office." Id., at 246.

Sick -
There are only
two categories
of immunity:
absolute
&
qualified.
I suppose
what we
meant
was that
a plaintiff
must
show a
stronger
case. But
don't
go

"In short," we concluded, "since the options which a chief executive and his principal subordinates must consider are far broader and more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad." Ibid. Nonetheless, despite our perception that high officials will require greater protection than those with less complex discretionary responsibilities, we held in Scheuer that a governor and his chief subordinates could receive the requisite protection from a limited or good-faith immunity. Ibid., at 247-248. 120 125

In Butz v. Economou, 438 U.S. 478, 503 (1978), we applied the "governing principles" of Scheuer to federal officials. For them as for state executive personnel, we acknowledged the need for official immunity even from suits alleging constitutional violations. But we clearly established that good faith immunity would represent the norm. We continued to acknowledge that the special functions of some officials might require absolute 130 135

that "federal officials who seek absolute exemption from personal liability must bear the burden of showing that public policy requires an exemption of that scope." Butz, supra, 438 U.S., at 506. This too we reaffirmed in Nixon.

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III

In attempting to carry the burden established by our cases, petitioners undertake to derive an entitlement to absolute immunity from the absolute immunity possessed by the President. They also advance a related argument that the functions of White House aides are invested with a special sensitivity, which entitles them to absolute immunity under the Butz reservation of absolute immunity for "those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." 438 U.S., at 507.

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A

Petitioners' claim to "derivative" immunity rests heavily on the decision of this Court in Gravel v. United States, 408 U.S. 606 (1972). In Gravel we held that the

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In so holding we looked to the "central role" of the Speech and Debate Clause, which we identified as being "to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." 408 U.S., at 617. Both the District Court and the Court of Appeals had concluded that "it was 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...." Id., at 616. We substantially endorsed that view. Having done so, we held the Speech and Debate Clause applicable to the "legislative acts" of a Senate aide that would have been privileged if performed by the Senator himself. Id., at 621-622.

In arguing that the analysis of Gravel mandates a similarly "derivative" immunity for the chief aides of the President of the United States, petitioners correctly assert that the President must delegate a large measure of

is not without force. We believe, ^{11.} however, that in light of Rhodes and Butz, it must be rejected.

necessary in order to promote all of the policies supporting absolute immunity for the President himself.

Petitioners' argument ^{emphasized} sweeps too far. As we explained today in Nixon v. Fitzgerald, supra, the

President's absolute immunity derives in principal part

from factors unique to his constitutional station. No

other official has responsibilities nearly so broad. No

other official approaches the President's status in the

constitutional scheme. Suits against presidential aides

therefore do not invoke the special separation-of-powers

considerations implicated by suits against the President

himself. Moreover, petitioners have not shown that a

blanket prohibition of suits against presidential

subordinates is necessary to the President's effective

performance of his constitutional functions. Presidential

aides perform a range of tasks from the sensitive and

discretionary to the routine and ministerial. The duties

of some are essentially political. The undifferentiated

extension of absolute "derivative" immunity therefore

What about immunity accorded judges, prosecutors and even the admin. officers specified in Butz?

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we emphasized that the protection of the Speech and Debate Clause does not extend to all acts within the outer perimeter of a legislator's official duties. Applicable only to acts performed in Congress's "central role" of proposing and debating legislation, the Clause does not "privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech and debate" 408 U.S., at 620 (emphasis added). 205

By construing the Speech and Debate Clause in these "functional" terms, Gravel employs an analytical approach closely analogous to that of Scheuer and Butz. Clearly Gravel in no way denies the principle that the scope of an official's immunity generally should depend on the sensitivity and the complexity of his official functions. 210 215

B

Petitioners also assert an entitlement to immunity based on the "special functions" of White House aides. Their argument again claims more than our cases will support. / For aides entrusted with discretionary authority 220

the public business." Butz v. Economou, supra, 438 U.S.,
 at 507. But a "special functions" rationale does not
 warrant a blanket extension of absolute immunity to all
 presidential aides in the performance of all their
 offices. This conclusion follows inescapably from our
 decision in Butz, in which we held that a Cabinet officer
 generally could not claim absolute immunity from suits
 alleging constitutional violations. Immunity must be
 justified by the special functions of offices, not the
 mere fact of high executive station. It would be
 anomalous at best to hold that White House aides generally
 enjoy absolute immunity, which they actually might forfeit
 if appointed to assume greater and more sensitive
 responsibilities as a member of the Cabinet.

IV

The approaches of Butz and Gravel both indicate that
 the scope of an aide's immunity should vary with the
 functions of the office assigned him by the President of
 the United States. Our cases indicate that two inquiries

*Disks -
 3 & 4 the
 "functional"
 approach
 limited
 to the
 "office"
 or to the
 particular
 action? I think it
 can be
 both. See
Imbler & Butz*

entitlement to absolute immunity must be rooted ^{primarily} in the functions of offices, not based ^{normally} solely on discrete acts. 245

This is necessary to achieve some minimum of certainty and predictability--both for citizens believing that their rights have been violated and for officials anxious that their conduct may be called in question.¹³ At the second

stage, however, it does become necessary to examine particular acts, in order to determine whether a presidential aide in fact was discharging a protected function when he performed the act on which liability is predicated.¹⁴ The inquiry here has a familiar analogue in

the common law: Was the action within the outer perimeter 255

13 As Professor Schuck has written, "To minimize uncertainty, rules should be simple, predictable, and so easily applied that the immunity questions can be resolved at a very early stage of the trial." Schuck, Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages, 1980 Sup. Ct. Rev. 281, 325. This aim would be defeated entirely if every presidential aide--regardless of his duties of office--could invoke a claim that a particular act was somehow related to a presidential function of great sensitivity. By the same token, the deterrent purpose of damage actions would be undermined if all White House officials believed themselves possessed of a colorable claim to absolute immunity.

14 The need for such an inquiry is ^{made clear} at least implicit in this Court's decision in Butz v. Economou, supra, 438

of the official's protected function?¹⁵

Applying these standards to the claims advanced by petitioners Harlow and Butterfield, we conclude that neither has shown that "public policy requires [for his office] an exemption of [absolute] scope." Butz, supra, 260

438 U.S., at 506. Although an important discretionary post, Harlow's position as the senior aide for congressional relations did not entail regular responsibilities in any such especially sensitive areas as prosecution, adjudication, or national security. 265

Petitioner Butterfield is sued on the basis of actions allegedly taken during his tenure as Deputy Assistant to the President and Deputy Chief of Staff. Despite being senior level assignments, these posts also do not appear to have included functions requiring absolute immunity as a matter of compelling public policy.

V

¹⁵Cf. Spalding v. Vilas, 161 U.S. 483, 498 (1896) (immunity extends to all matters "committed by law to [an

How
do we
know
this?
Harlow
also
was
"Counsellor"
to the
President
during
part of
the period

I'm
not
sure
270
as to
the
extent
of
speculation
of
absolutely
discretion

As we recognized today in Nixon, supra, 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. Butz, supra, 438 U.S., at 506. It is this recognition that has required the denial of absolute immunity to most public officers. At the same time, history has taught that claims frequently run against the innocent as well as the guilty--at a cost not only to innocent officials, but to the society as a whole. These social costs include ~~the~~

Excluded from a list { ~~expenses of litigation, the~~ diversion of official energy from pressing public issues, ^{primarily} ~~and~~ the deterrence of able citizens from the acceptance of public office. *In addition, there is the risk of serious*

In Butz, supra, we emphasized the protections available to public officials under a rule of qualified immunity. Experience indicates that these protections may work less effectively in practice than our decision had

evils as we do, we must continue to rely on the principles
stated in Butz, supra, 438 U.S., at 507-508:

Has not worked { "Insubstantial lawsuits [should] 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. See 416 U.S., at 250. 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." 438 U.S., at 507-508 (footnote omitted).

VI

For the reasons stated in this opinion, the judgment of the Court of Appeals is vacated, and the case remanded for further action consistent with this opinion. So ordered.

Dick - Subject to
my editing, this looks
good to me. It fully
conforms to ~~the~~ my views
except the note I suggested
as to the Buena issue
is omitted - unless I
February 15, 1982
overlooked it. I have
a reason?

When David has edited
this, move to a Chambers
Draft.

H.F.P

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No. 80-945, Harlow and Butterfield v. Fitzgerald

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
on their acts in office.

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I

In this suit for civil damages petitioners Bryce
Harlow and Alexander Butterfield are alleged to have
participated in a conspiracy to violate the constitutional
and statutory rights of the respondent A. Ernest
Fitzgerald. Respondent avers that petitioners entered the

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conspiracy is the same as that involved in Nixon v. Fitzgerald, ante, the facts need not be repeated in detail.

Respondent alleges that Harlow entered the conspiracy 25
in his role as the presidential aide principally
responsible for congressional relations.¹ At the
conclusion of discovery the supporting evidence remained
inferential. As evidence of Harlow's conspiratorial
activity respondent relies heavily on the history of 30
communication between Harlow and Air Force Secretary
Robert Seamans. The record reveals that Secretary Seamans
called Harlow in May, 1969, to inquire about likely
congressional reaction to a draft reorganization plan that
would cause Fitzgerald's dismissal.² Through an aide 35

¹Harlow held this position from the beginning of the Nixon Administration on January 20, 1969 through November 4, 1969. On that date he was designated as Counsellor to the President, a position accorded Cabinet status. He served in that capacity until December 9, 1970, when he returned to private life. Harlow later resumed the duties of Counsellor for the period from July 1, 1973 through April 14, 1974. Respondent appears to allege that Harlow continued in a conspiracy against throughout the various changes of official assignment. ^h

Harlow responded that "this was a very sensitive item on the Hill and that it would be [his] recommendation that [the Air Force] not proceed to make such a change at that time."³ But the Air Force persisted. Seamans spoke to Harlow on at least two subsequent occasions during the spring of 1969. The record also establishes that Secretary Seamans called Harlow on November 5, 1969, shortly after the public announcement of Fitzgerald's impending dismissal.⁴ The other evidence most supportive of Fitzgerald's claim consists in a recorded conversation in which the President later voiced a tentative recollection that Harlow was "all for canning" Fitzgerald.⁵

In his motion for summary judgment Harlow argued that exhaustive discovery had adduced no direct evidence of his involvement in any conspiratorial activity. In his brief in this Court Harlow cites the deposition testimony

³Id., at 152a.

⁴Id., at 152a.

of Air Force Secretary Seamans, who averred that he "never received any instruction" regarding Fitzgerald's dismissal.⁶ Disputing the probative value of Richard Nixon's recorded remark, Harlow emphasizes the tentativeness of the President's statement. To the President's query whether Harlow was "all for canning [Fitzgerald], wasn't he?", White House Press Secretary Ronald Ziegler in fact gave a negative reply: "No, I think Bryce may have been the other way."⁷

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According to the averment's of respondent's complaint, petitioner Butterfield also entered the conspiracy not later than May of 1969. Employed as Deputy Assistant to the President and Deputy Chief of Staff to H.R. Haldeman,⁸ Butterfield circulated a White House memorandum in that month in which he claimed to have learned that Fitzgerald planned to "blow the whistle" on

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⁶JA, at 159a-160a.

⁷See JA, at 284a. The President did not respond to Ziegler's remark.

⁸the record establishes that Butterfield worked

some "shoddy purchasing practices" by leaking documents to a congressional committee.⁹ Butterfield reported that this information had been referred to the Federal Bureau of Investigation. Fitzgerald characterizes this memorandum as evidence that Butterfield had commenced efforts to secure Fitzgerald's retaliatory dismissal. Fitzgerald also relies heavily on communications between Butterfield and Haldeman in December 1969 and January 1970. After the President had promised at a press conference to inquire into Fitzgerald's dismissal, chief of staff Haldeman solicited Butterfield's recommendations. In a subsequent memorandum emphasizing the importance of "loyalty," Butterfield counselled against offering Fitzgerald another job within the Administration.¹⁰

For his part, Butterfield denies that he took part in any decision involving Fitzgerald's employment status until Haldeman sought his advice in December 1969--more than a month after Fitzgerald's termination had been

scheduled and announced publicly by the Air Force. According to Butterfield, eight years of litigation¹¹ have established a basis for the conclusion that his May memorandum concerning Fitzgerald's alleged "whistle-blowing" cannot be connected with the Air Force decision to terminate Fitzgerald's employment. Butterfield also argues generally that discovery has failed to adduce any evidence that he caused injury to Fitzgerald.

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Together with their codefendant Richard Nixon, petitioners Harlow and Butterfield moved for summary judgment on February 12, 1980. In denying the motion the District Court upheld the legal sufficiency of Fitzgerald's Bivens claim under the First Amendment and his "inferred" statutory actions under 5 U.S.C. § 7211 and 18 U.S.C. § 1505. The court found that there were genuine issues of disputed fact remaining for resolution at trial.

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¹¹See Fitzgerald v. Seamans, 384 F. Supp. 688 (DDC 1974), aff'd in part and rev'd in part, 553 F.2d 220 (CA DC 1977). Together with eight officials of the Department of Defense, Butterfield was accused in Fitzgerald's initial complaint of conspiring to cause Fitzgerald's retaliatory discharge.

It also ruled that petitioner^S_^ did not possess absolute immunity from this suit for civil damages.

Independently of former President Nixon, petitioners 105
invoked the collateral order doctrine and appealed the
denial of their immunity defense to the Court of Appeals
for the District of Columbia Circuit. The Court of
Appeals ~~entered an order of~~ *simply ordered its* dismissal. Never having
determined the immunity available to the senior aides and 110
advisers of the President of the United States, we granted
certiorari. ____ U.S. ____, ____ (1981).¹²

II

As we reiterated today in Nixon v. Fitzgerald, ante,
our decisions consistently have recognized that government 115
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

¹²As in Nixon, ante, our jurisdiction has been challenged on the basis that the District Court's order denying petitioners' claim of absolute immunity was not an appealable final order and that the Court of Appeals' dismissal of petitioners' appeal establishes that this

interference with their duties and to alleviate potentially incapacitating fears of liability.

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Our decisions have recognized immunity defenses of two kinds. For some officials whose special status or functions have been thought to require complete protection from suit, we have recognized the defense of "absolute immunity." The absolute immunity of prosecutors, in their prosecutorial function, and of judges, in the performance of judicial functions, now is well settled. See, e.g.,

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Butz v. Economou, 438 U.S. 478 (1978). We have not held that executive and administrative officials never may enjoy absolute immunity. On the contrary, we have held explicitly that this factor is not determinative, Butz, supra, 438 U.S., at 511-512, and in fact have extended

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absolute immunity to prosecutors, to executive officials ^{when} engaged in adjudicative functions, ibid., at 513-517, and

to the President of the United States, see Nixon v. Fitzgerald, ante. For executive officials, however, our cases make plain that qualified immunity represents the

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Seems to be about this transition

considered the scope of the immunity available to the 140
 Governor of a State and his chief subordinates. In
Scheuer we noted that high executive officials frequently
 must make decisions in an "atmosphere of confusion,
 ambiguity, and swiftly moving events." Id., at 247.
 "[S]ince the options which a chief executive and his 145
 principal subordinates must consider are far broader and
 more subtle than those made by officials with less
 responsibility," we reasoned, "the range of discretion
 must be comparably broad." Ibid. Nonetheless, despite
 our perception that high officials will require greater 150
 protection than those with less complex discretionary
 responsibilities, ~~we held in~~ *was decided in the belief* Scheuer that a governor and
 his aides could receive the requisite protection from ~~a~~
qualified ~~limited~~ or good-faith immunity. Ibid., at 247-248.

In Butz v. Economou, 438 U.S. 478, 503 (1978), we 155
 applied the "governing principles" of Scheuer to federal
 officials. Concluding that a blanket grant of immunity
 would be anomalous in light of the qualified immunity

by basic constitutional guarantees," id., at 508, we determined that public policy generally would be served best by affording to federal executive officers a defense of qualified immunity. In Butz as in Scheuer this standard reflected an attempt to balance competing principles. Cognizant not only of the importance of a damages remedy to protect the rights of citizens, 438 U.S., at 504-505, but also of "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority," id., at 506, we expressed our choice of qualified immunity in balancing terms. Without discounting ~~the~~ the adverse policy consequences of private lawsuits, we relied on procedural guarantees that frivolous suits could be terminated quickly:

"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

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at 507-508.

Nevertheless, despite our decision that qualified immunity should be the norm, Butz continued to acknowledge that the special functions of some officials might require absolute immunity, and in fact extended such immunity to administrative officials with prosecutorial and adjudicative functions. Id., at 513-517. We emphasized, however, that "federal officials who seek absolute exemption from personal liability must bear the burden of showing that public policy requires an exemption of that scope." Id., at 506. This we reaffirmed today in Nixon v. Fitzgerald, ante.

III

In attempting to justify an extension to them of absolute immunity, petitioners, as presidential aides and advisors, undertake to derive an ~~an~~ immunity of this scope from the absolute immunity possessed by the President himself. They also advance a related argument

A

Petitioners' claim to "derivative" immunity rests 215
heavily on the decision of this Court in Gravel v. United
States, 408 U.S. 606 (1972).¹³ In Gravel we held that the
congressional privilege under the Speech and Debate Clause
extended to certain acts performed by a Senatorial aide.
In so holding we looked to the "central role" of the 220
Speech and Debate Clause, which we identified as being "to
prevent intimidation of legislators by the Executive and
accountability before a possibly hostile judiciary." 408
U.S., at 617. Both the District Court and the Court of
Appeals had concluded that "it was literally impossible 225
... 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...." Id., at 616. We substantially 230

¹³Petitioners also rely on other cases in which this Court has held that Congressional employees are derivatively entitled to the legislative immunity provided

endorsed that view. Having done so, we held the Speech and Debate Clause applicable to the "legislative acts" of a Senate aide that would have been privileged if performed by the Senator himself. Id., at 621-622.

In arguing that the analysis of Gravel mandates a similarly "derivative" immunity for the chief aides of the President of the United States, petitioners correctly assert that the President must delegate a large measure of authority merely to execute the duties of his office. For this reason, they argue, "derivative" immunity is necessary in order to promote all of the policies supporting absolute immunity for the President himself.

Petitioners' argument is not without force. Ultimately, however, it sweeps too far. As we explained today in Nixon v. Fitzgerald, ante, the President's absolute immunity derives in principal part from factors unique to his constitutional station. No other official approaches the President's status in the constitutional scheme. No other official has responsibilities nearly so

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Fol. 1?

immunity for all his official acts. No further inquiry is

needed to determine the particular presidential function

in which an act was taken. In contrast with the

official's claiming congressional immunity in Gravel and

similar cases, petitioners here fail to establish that

public policy requires an extension to them of an immunity

equal to that of their principal. Suits against

presidential aides do not invoke the special separation-

of-powers considerations implicated by suits against the

President himself. Moreover, petitioners have not shown

that a blanket prohibition of suits against presidential

subordinates is necessary to the President's effective

performance of his constitutional functions. Presidential

aides perform a range of tasks from the sensitive and

discretionary to the routine and ministerial. ^{Often} The duties

of some are ~~essentially~~ political. The undifferentiated

extension of absolute "derivative" immunity therefore

could not be reconciled with the "functional" approach of

Scheuer and Butz, or indeed with Gravel itself.

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*I think
Scheuer
and Butz
capture the
point that
if further inquiry
was to destroy
purpose of
absolute
immunity*

Why not?

within the outer perimter^e of a legislator's official
 duties. Applicable only to acts performed in Congress's
 "central role" of proposing and debating legislation, the
 Clause does not "privilege illegal or unconstitutional
 conduct beyond that essential to foreclose executive
 control of legislative speech and debate" 408 U.S.,
 at 620 (emphasis added).¹⁴ By construing the Speech and
 Debate Clause in these "functional" terms, Gravel employs
 an analytical approach closely analogous to that of
Scheuer and Butz. ~~Clearly~~ Gravel in no way denies the
 principle that the scope of an official's immunity
 generally should depend on the sensitivity and the
 complexity of his official functions.

B

Petitioners also assert an entitlement to immunity
 based on the "special functions" of White House aides.
 Their argument again claims more than our cases will
 support. For aides entrusted with discretionary authority

Book - In Nixon Tapes
16.
case I think we suggested
absolute privilege would or
might exist as to this matters.
If no,

in such sensitive areas as national security or ^{foreign} ~~national~~
~~policy~~ ^{policy} ~~defense~~ ^{well} absolute immunity might be justified to protect
their unhesitating performance of functions so vital to
the national interest. But a "special functions"
rationale does not warrant a blanket extension of absolute 295
immunity to all presidential aides in the performance of
all their ^{duties} ~~offices~~. This conclusion follows inescapably
from our decision in Butz, in which we held that a Cabinet
officer--a high officer of the executive branch directly
accountable to the President--generally could not claim 300
absolute immunity from suits alleging constitutional
violations. Butz plainly affirms that an executive
official's claim to absolute immunity must be justified by
reference to the public interest in the special functions
of his office, not the mere fact of high executive 305
station.

IV

The approaches of Butz and Gravel both indicate that
the nature and scope of an aide's immunity must depend

some aides are assigned to act as presidential "alter egos," cf. Gravel, supra, 408 U.S., at 616-617, in the exercise of functions for which absolute immunity is "essential for the conduct of the public business," Butz, supra, 438 U.S., at 507. It is clear from our cases, however, that the burden to establish this claim rests on the official asserting a right to absolute immunity. In order to carry this burden, a presidential aide first would need to show that the responsibilities of his office did in fact embrace functions so sensitive as to require a total shield from liability. Our decision of this case requires no *J* general enumeration of protected functions. Our cases make plain, however, that the relevant inquiries would encompass considerations of public policy and of either the common law or, more likely, our constitutional heritage and structure. See Nixon v. Fitzgerald, ante.

Having established that his duties of office included functions warranting the protection of absolute immunity, the presidential aide then would need to establish that he

inquiry here has a familiar analogue in the common law:
 Was the action within the outer perimeter of the
 official's protected function?¹⁶

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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." Butz, supra, 438 U.S.,
 at 506. 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. We do
 not, however, foreclose the possibility that petitioners,
 on remand, could satisfy the standards properly applicable

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¹⁵The need for such an inquiry is at least implicit in this Court's decision in Butz v. Economou, supra, 438 U.S., at 508-517; see Imbler v. Pachtman, 424 U.S. 409, 430-431 (1976). Cases involving immunity under the Speech and Debate Clause have inquired explicitly into whether a particular acts and activities qualified for the protection of the Clause. See, e.g., Gravel v. United States, supra; Doe v. McMillan, 412 U.S. 306 (1973)

¹⁶See Spalding v. Vilas, 161 U.S. 483, 498 (1896) (immunity extends to all matters "committed by law to [an official's] official functions").

Dick - There may be little if any difference between "frivolous" & "insubstantial." I prefer the latter because in pleading, & on summary judgment, few ^{factual} claims - however far out - are viewed as frivolous. Also Butz uses "insubstantial."

Even if they cannot establish that their official functions require absolute immunity, petitioners assert that public policy at least mandates an application of the qualified immunity standard that would permit the defeat of ~~frivolous~~ ^{insubstantial} claims without resort to trial. We agree.

A

As we recognized today in Nixon v. Fitzgerald, ante, 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. Butz, supra, 438 U.S., at 506. It is this recognition that has required the denial of absolute immunity to most public officers. 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

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These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, *-- perhaps most important of all --* and the deterrence of able citizens from the acceptance of public office.

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In Butz, supra, 438 U.S., at 507-508, as in Scheuer, supra, 416 U.S., at 245-248, we ^{*considered*} ~~undertook an inquiry into~~ the protections available to public officials under a rule

of qualified immunity. In striking ^{*a*} ~~the~~ balance, ~~of evils~~

~~as we did~~, we relied on the assumption that qualified

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immunity would permit "[i]nsubstantial lawsuits [to] be quickly terminated." Butz, supra, 438 U.S., at 507-508;

see Hanrahan v. Hampton, 446 U.S. 754, 765 (Powell, J.,

concurring in part and dissenting in part). The

importance of this consideration ^{*hardly needs*} ~~scarcely~~ could be

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^{*stating*} ~~overstated~~. This Court has noted the risk ^{*incident*} ~~hazarded by~~

^{*imposed upon*} political officials who must defend their motives before a

jury. See Lake Country Estates, Inc. v. Tahoe Regional

Planning Agency, 440 U.S. 391, 405 (1979); Tenney v.

Brandhove, 341 U.S. 367, 377-378 (1951).¹⁸ We therefore 385
 have admonished that insubstantial suits should "not
 proceed to trial, but can be terminated on a properly
 supported motion for summary judgment." Butz, supra, 438
 U.S., at 507-508.

Petitioners present persuasive arguments that the 390
 implementation of this admonition--a factor presupposed in
 the balance of competing interests struck by our prior
 cases--requires a clarification of the standards of
 pleading and proof to be applied to the immunity claims of
 high officials. Under the Federal Rules of Civil 395
 Procedure disputed questions of fact ordinarily may not be
 decided on motions for summary judgment.¹⁹ Applying this
 standard in suits against public officials, courts have
 hesitated to dismiss by summary judgment even claims for
 which plaintiffs have adduced little or no factual 400

¹⁸As the Court observed in Tenney, "In times of passion, dishonest and vindictive motives are readily attributed ... and as readily believed." 341 U.S., at 378.

Therefore
It is increasingly clear
that Rule 56 is not being
applied consistently with our
admonition in Buter

support.²⁰ Reasoning that an officials's "good faith" is itself a question of fact, the ~~lower~~ federal courts also have denied summary judgment on this issue, sometimes finding a plaintiff's unsupported averment sufficient to force a trial.²¹

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If high officials cannot avoid trial even on frivolous claims against them, the "balance of evils" contemplated by our cases cannot be attained in fact. Having reasoned from the empirical premise that vacuous charges could be dismissed without trial, we cannot ignore

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experiment in

²⁰As Judge Gesell explained in his concurring opinion in Halperin v. Kissinger, supra, 606 F.2d, at 1212:

"It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient. In short, if these standards are those to be followed in these cases, trial judges will almost automatically have to send such cases to full trials on the merits."

For cases in which qualified immunity was granted only after trial, see Knell v. Bewnsinger, 522 F.2d 720 (CA7 1975); Ohland v. City of Montpelier, 467 F.Supp. 324 (D.Vt. 1979).

Dick -
Omni
Mr. H.
It may
not be
too clear
what we
mean by
"balance
of evils."
more important
I don't
want to
over-emphasize
reliance on
Q. & Schuck, ever
though they
are our
strongest
authority.

the counsel of distinguished jurists,²² and academic commentators²³ that high public officials not only can be, but frequently are, harassed by frivolous lawsuits.

B

In Gomez v. Toldeo, 446 U.S. 635 (1980), this Court 415
held that a claim of "good faith" immunity is an
affirmative defense, which must be pleaded by the
defendant.²⁴ But we did not reach the question of the
burden of proof on this issue. See ibid., at 642
(Rehnquist, J., concurring). Petitioners urge that the 420
burden of showing lack of good faith should be placed on
the plaintiff. Further, where a defendant--by affidavits
or otherwise--effectively controverts a plaintiff's
factual averments, petitioners argue that the plaintiff
should be required to make some ^{substantial} ~~non-trivial~~ evidentiary 425
showing in order to survive a motion for summary judgment.

²²See Halperin v. Kissinger, supra, 606 F.2d, at 1214-1215 (Gesell, J., concurring).

²³See, e.g., Schuck, supra.

²⁴See, e.g., id.

You might add these cases as

We are ^{generally} ~~substantially~~ in accord with petitioners' views.

In order to provide an effective barrier to trial of ~~frivolous~~ ^{lacking substance} claims, we believe that an official's claimed entitlement to qualified immunity must be accorded substantial weight, not only at trial but on a motion for summary judgment.²⁵ Consistently with this view, we hold

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²⁵There is implicit support for this view in decisions in which this Court has contemplated that an official's perception of events generally would provide the basis for judging his actions. As the Court stated in Scheur v. Rhodes, supra, 416 U.S., at 247-278 (emphasis added):

"These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of the responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based."

Emphasizing the necessity for judicial deference to the official's invocation of an immunity defense, the Court in Scheuer quoted from Justice Holmes's opinion in Moyer v. Peabody, 212 U.S. 78, 85 (1909):

"No doubt there are cases where the expert on the spot may be called upon to justify his conduct later in court, notwithstanding the fact that he had sole command at the time and acted to the best of his knowledge. That is the position of the captain of a ship. But even in that case great weight is to be given to his determination and the matter is to be judged on the facts as they appeared then and not merely in the light of the event." (emphasis added).

As has been observed of Mr. Justice Harlan and Judge Learned Hand, Mr. Justice Holmes was neither an "inexperienced neophyte who lacked the vision or the

Will this include
all defendant's
entirety? or qualified
immunity? High exposure
State (Federal)? State?
police?

that a defendant's assertion of this defense shifts the
burden to the plaintiff to ^{prove} ~~show~~ by a preponderance of the

evidence that the official did not act either in objective

or subjective good faith. ^{And} ~~Further~~ ^{in order} to effectuate

our admonitions that ^{insubstantial} ~~frivolous~~ claims should be ^{rejected} ~~defeated~~

without resort to trial, we ^{think} ~~believe~~ that a plaintiff ^{must} ~~must~~

~~be required to make some reasonable evidentiary showing in~~

^{carry this burden in}

order to survive a motion for summary judgment.²⁶ In

order to carry his burden at trial, a plaintiff of course

^{must} ~~would need to~~ prove all elements of his affirmative case

~~by a preponderance of the evidence.~~ ^{At the} ~~stage of~~

Th

^{stage} summary judgment ¹ in a case involving immunity claims by

high government officials, we think it appropriate to

²⁶Cf. Halperin v. Kissinger, supra, 606 F.2d, at 1215 (Gesell, J., concurring):

"In order to give the immunity doctrine some genuine force and effect, it appears to me that a plaintiff should be required to make a stronger showing than the Court's opinion requires on the immunity question before being permitted to proceed to trial. I would hold that the plaintiff must establish after the completion of discovery and before the trial commences, not merely the existence of a genuine dispute as to some material issue of fact, but also, by the preponderance of the evidence or

Dick: I would would not anticipate a dissent claiming we lack power. Let's hold our fire

require
demand a showing of evidence *by the plaintiff* with allowance for the uncertainty of developments at trial--from which a rational juror reasonably might *could* be able to conclude that the preponderance standard was satisfied.

C

We have the responsibility
~~There can be no doubt of our power~~ to fashion

Omit
procedural and evidentiary rules necessary to the implementation of the law of official immunity. As we affirmed today in Nixon v. Fitzgerald, ante, the law of immunity remains, as it "has been, largely of judicial making." Moreover, courts traditionally have determined the methods of pleading, proof, and procedure appropriately applied to claims of different kinds.

Neither do we view today's decision as a departure from the principles of our prior cases. On the contrary, we act in implementation of one of the central tenets on which previous decisions have rested: "Qualified immunity" should afford realistic protection, not only against adverse judgments, but against the expense, annoyance, and

lfp/ss 02/16/82

Rider A, p. 27 (Harlow)

(Add to p 26 as a Note)

HAR27 SALLY-POW

← In allocating the burden of proof to the plaintiff when immunity is put in issue, we protect the public interest in the effective administration of government -- an interest that indisputably is threatened when insubstantial claims against officials result in protracted and vexatious litigation. Requiring proof of substantiality will in so way deter or frustrate meritorious claims. The requirements for pleading remain the same. If the defendant advances the defense of good faith immunity, the plaintiff will retain access to reasonable discovery to aid in carrying his burden. And *although the plaintiff* ^{he} need not prove the merits of his case on a motion for summary judgment, ^{he} ~~but~~ must make a showing of

substantiality adequate to justify the cost -- both public and private -- of subjecting a government official to trial.

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as a footnote

27.

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"no. 1" was 3

~~attain a prudential balance between competing concerns.~~

In crafting rules for the pre-trial dismissal of ^{vexatious} frivolous suits, we ^{intend} aim principally to protect the public interest in the effective administration of government--an interest that indisputably is threatened by vexatious lawsuits.

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~~But the rules prescribed by our decision will impair few if any plaintiffs with meritorious claims. In order to commence a lawsuit a plaintiff need only plead the tortious behavior of a public official. By entering a defense of good faith, the official then may shift the burden of proof on this issue, and further may require some showing of evidence in order to demonstrate that summary judgment is not appropriate. But the plaintiff, in undertaking to meet his burdens, will retain access to reasonable discovery. And he need not prove his case on a motion for summary judgment, but merely make a showing sufficient to warrant the costs--both public and private--of subjecting the defendant to trial.~~

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in light of this opinion.

survive their motion for summary judgment, ~~under~~
~~appropriate standards.~~ *however,* We think it appropriate to remand

the case for consideration of this issue by the District

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Court. *is more familiar* The trial court ~~has a more intimate familiarity~~

is better with the record so far developed and ~~if necessary, could~~
situated to *if deemed necessary.* make further findings ~~about the contemplated order of~~

proof at trial. With these advantages, the District Court

possibly could draw conclusions inaccessible to this Court

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on the record before us.

VI

J For the reasons stated in this opinion, *T* the judgment

of the Court of Appeals is vacated, and the case remanded

for further action consistent with this opinion.

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So ordered.

*Dist. -
Retain
this
sentence →*

L 7 P
Renewed
3/4

rhf March 5, 1982

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OBJECTIVE INTENT

IV

Even if they cannot establish that their official
functions require absolute immunity, petitioners assert
that public policy at least mandates an application of the
qualified immunity standard that would permit the defeat
of insubstantial claims without resort to trial. We
agree.

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A

As we recognized today in Nixon v. Fitzgerald, ante,
at ___, the resolution of immunity questions inherently

for vindication of constitutional guarantees. Butz v. Economou, supra, 438 U.S., at 506; see Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 410 (1971) ("For people in Bivens' shoes, it is damages or nothing."). It is this recognition that has required the denial of absolute immunity to most public officers. 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 the society as a whole.¹ These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and--perhaps most important of all--the deterrence of able citizens from the acceptance of public office.

In identifying qualified immunity as the best attainable accommodation of competing values, in Butz, supra, 438 U.S., at 507-508, as in Scheuer, supra, 416 U.S., at 245-248, we relied on the assumption that this

standard would permit "[i]nsubstantial lawsuits [to] be quickly terminated." Butz, supra, 438 U.S., at 507-508; see Hanrahan v. Hampton, 446 U.S. 754, 765 (Powell, J., concurring in part and dissenting in part).² Yet petitioners advance persuasive arguments that the dismissal of insubstantial lawsuits without trial--a factor presupposed in the balance of competing interests struck by our prior cases--requires an adjustment of the substantive and evidentiary standards established by our decisions.

B

Qualified or "good faith" immunity is an affirmative defense that must be pleaded by a defendant official. Gomez v. Toledo, 446 U.S. 635 (1980).³ Decisions of this

²The importance of this consideration hardly needs emphasis. This Court has noted the risk imposed upon political officials who must defend their actions and motives before a jury. See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 405 (1979); Tenney v. Brandhove, 341 U.S. 367, 377-378 (1951). As the Court observed in Tenney, "In times of political passion, dishonest or vindictive motives are readily attributed ... and as readily believed." 341 U.S., at 378. It is for this among other reasons that Butz, *supra*, admonished that

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." Wood v. Strickland, 420 U.S. 308, 320 (1975). The subjective component refers to "permissible intentions." Id. Characteristically the Court has defined these elements by identifying the circumstances in which qualified immunity would not be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if 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" Ibid., at 321-322 (emphasis added).⁴

The
~~Of the objective and~~ subjective elements of the good
 faith defense, ~~the subjective aspect~~ has proved
 particularly unamenable to summary judgment. 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.⁵ Because an official's
 subjective "good faith" has been considered a question of
 fact, some courts apparently have regarded this issue as
 inherently requiring resolution by a jury.⁶

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No 71

For this reason the "subjective" component of the

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321, would be stripped on claimed immunity in an action under § 1983. Subsequent cases, however, have quoted the Wood formulation as a general statement of the qualified immunity standard. See, e.g., Procunier v. Navarette, 434 U.S. 555, 562-563, 566 (1978), quoted in Baker v. McCollan, 443 U.S. 137, 139 (1979).

⁵ ~~Rule 56 of the Federal Rules of Civil Procedure~~ states that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether summary judgment is proper, a court ordinarily must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party. E.g., Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962).

⁶ E.g., Landrum v. Moats, 575 F.2d 1320, 1329 (CA8

qualified immunity defense ~~frequently~~ frequently has
 proved incompatible with our admonition in Butz that
 insubstantial claims should not proceed to trial.

Viewed in the context of Butz's attempted balancing
 of competing values, ~~enormous~~ ^{substantial} costs attend the litigation

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of the subjective good faith of high officials of the
 Executive Branch. ^{*} The duties of ~~high Executive~~ ^{these} officers

often require decisions on controversial issues of gravest
 importance, in an environment in which views inevitably

are affected by loyalty, ideology, and emotion. This

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environment in part explains why questions of intent so

rarely can be decided ^{by summary judgment} ~~on affidavits~~. Yet it also frames a

background in which there often is no clear end to the

evidence that may be probative of subjective intent.

Judicial inquiry into subjective motivation therefore may

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entail broad-ranging discovery and the ~~deposition~~ ^{deposing} of large

~~numbers~~ ^{numerous} of officials. ^{Litigation} ~~litigious~~ burdens of this kind not

only can distract officials from the performance of their

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we cite
in a
note
Gersell's
statement?*

decisionmaking should not be undertaken lightly.⁷

As we affirmed in Nixon v. Fitzgerald, ante, there are situations in which sufficiently compelling justifications exist. In the case of private suits for damages, however, we conclude today that bare allegations of malice should not suffice either to subject high federal officials to the costs of trial or to license

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ask?*

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⁷See Nixon v. Fitzgerald, ante, at ____; Nixon v. Administrator of General Services Administration, 433 U.S. 425, 433 (1977); United States v. Nixon, 418 U.S. 683, 711-712 (1974). As the Court recognized in United States v. Nixon:

"A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."

418 U.S., at 705-706, 708. Many of the policy considerations implicated by Presidential communications would apply with nearly equal force to communications among Presidential aides and other high Executive officials. The separation-of-powers concerns are different in the two cases, being less weighty where the President personally is not involved. As distinguished commentators have observed, however, the "separation of powers" is "a 'political doctrine' and not a technical rule of law." Frankfurter & Landis, Power of Congress Over Procedure in Criminal Contempt Cases in "Inferior" Federal Courts--A Study in Separation of Powers, 37 Harv. L. Rev. 1010, 1014 (1924) (footnote omitted). Even where the separation-of-powers doctrine imposes no absolute barrier to judicial

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And in that circumstances, Cite Rhodes.
Duck - As drafted this would eliminate the ~~malice~~ ^{executive} component 8. Only in suits vs "high ^{executive} officials". Let's discuss this. Perhaps this is best, but add a note leaving open whether this change in standard extends to lesser broad-reaching discovery, that ~~corrodes sound government.~~ *offensive.*

Consistently with the balance ^{we sought to attain} at which we aimed in Butz, 110

we therefore hold that ^{at least} high executive officials are

shielded from liability for civil damages insofar as their

conduct does not violate ^{unquestioned constitutional} ~~established legal~~ rights of which

they reasonably should have known. ^{Wood v. 5 Freedland, supra at 320.} Absent a clear

congressional decision to the contrary, we conclude that 115

public policy will not support the cost of conditioning

their immunity on proof of subjective intent.⁸

Reliance on the objective reasonableness of an

official's conduct, as measured by reference to settled

law,⁹ ^{should} ~~will~~ avoid excessive disruption of government and 120

permit the resolution of ~~many~~ insubstantial claims on

summary judgment. The identification of established ^{law} ~~legal~~

rights lies within the competence of judges. It may

sometimes be a factual question what an official

⁸This case involves no claim that Congress has expressed its intent to impose "no fault" tort liability on high federal officials for violations of particular statutes or the Constitution.

reasonably could be expected to know.¹⁰ Charged with 125
 decisionmaking under pressures of time and limits of
 information, not every official could be held responsible
 for the most recent judicial developments. But the judge
 appropriately may determine what the law was at the time
 an action occurred, reserving for the jury only if 130
 necessary the question what a particular high official
 reasonably could be expected to know.

By defining the limits on a high official's
 qualified immunity solely in "objective" terms, we provide
 no license to lawless conduct. The public interest in 135
 deterrence of constitutional violations 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 knows that his conduct
 will violate constitutional rights, he should be made to 140
 hesitate. Where his duties legitimately require action in

¹⁰ Cf. *Procunier v. Navarette*, supra, 434 U.S. at

which established rights are not implicated--even if the action potentially is harmful to someone that the official dislikes--the public interest frequently may be served better by fearless and unhesitating action.¹¹

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C

In addition to the question of good faith, cases involving claims of qualified immunity frequently involve disputes over whether the official's allegedly wrongful actions ever occurred at all.¹² Where a defendant--by affidavits or otherwise--effectively controverts a plaintiff's factual averments, petitioners argue that the plaintiff should be required to make some substantial showing in order to survive a motion for summary judgment by a high federal official. Consistently with our view that a claim of immunity should provide an effective

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express our view as to

¹¹We emphasize that we hold only that a high federal official is shielded against liability for civil damages arising from actions within the scope of his duties and in "objective" good faith. We ~~intimate nothing about~~ the conditions in which injunctive or declaratory relief might be available.

barrier to trial of claims lacking in substance, we agree.
At the summary judgment stage in a case involving immunity
claims by high federal officials, we think it appropriate
to require a showing of evidence by the plaintiff--with 160
allowance for the uncertainty of developments at trial--
from which a rational factfinder reasonably could conclude
that the "preponderance of the evidence" standard was
satisfied.

Requiring this proof of substantiality will not deter 165
or frustrate meritorious claims. The requirements for
pleading, as for proof at trial, remain unchanged.
Further, the plaintiff retains access to reasonable
discovery to aid in carrying his burden. And he need not
prove the merits of his case on a motion for summary 170
judgment, but only make a showing of substantiality
adequate to justify the cost--both public and private--of
subjecting a high federal official to trial.

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appropriate, however, to remand the case to the District Court, for its reconsideration of this issue in light of this opinion.¹³ The trial court is more familiar with the record so far developed and also is better situated to make any such further findings as may be necessary.

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V

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

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So ordered.

We do not view either of these questions as insubstantial.

¹³ Petitioners also have urged us, prior to the remand, to rule on the legal sufficiency of respondent's "implied" causes of action under 5 U.S.C. § 7211 and 18 U.S.C. § 1505 and his Bivens claim under the First Amendment. ~~We do not wish to intimate that either the~~ statutory, Cf. Texas Industries, Inc. v. Radcliff Materials, 451 U.S. 630, 638-639 (1981) (1981) (controlling question is whether Congress affirmatively intended to create a damages remedy), or the Bivens question, cf. Bush v. Lucas, 647 F.2d 573, 576 (CA5 1981), affirming on remand 598 F.2d 958 (CA5 1979) (holding that the "unique relationship between the Federal Government and its civil service employees is a special consideration which

lfp/ss 03/12/82 Rider A, p. 19 (Harlow)

HARL19 SALLY-POW

In Butz we concluded that absolute immunity is unnecessary to protect the public interest in "encouraging the vigorous exercise of official authority", 435 U.S. at 506, because we believed that qualified immunity would adequately shield officials from liability for good faith mistakes. We assumed that such immunity would prove "workable". There are indications, however, that some District Courts have not understood our admonition in Butz that suits against high public officials should not proceed to trial in the absence of a showing of substantiality. We reiterate this admonition. A plaintiff retains, of course, access to reasonable discovery to aid in carrying his burden. And he need not

prove the merits of his case on a motion for summary judgment. But there should be a showing of sufficient substantiality to justify the costs - both public and private - of subjecting officials to protracted trials when it is evident at the summary judgment stage that the claims are insubstantial.

Note to Dick: I would like to try on Justice Stevens something along the foregoing lines. I agree with you that without Subpart C, the full force of our Part IV is somewhat diluted.

I repeat that I would like to include in a footnote much of what Gesell said at 608 F.2d at 1214, that I quoted on page 17 of the 6th draft of my memorandum (Version I) last spring.